87-1642

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CABLEVISION COMPANY,

Petitioner,

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*,
U.S. COPYRIGHT OFFICE AND ITS REGISTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 4, 1988

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QUESTIONS PRESENTED

1. Whether the U.S. Copyright Office (the "Copyright Office"), a division of the Library of Congress, in light of its lack of statutory power to enforce the provisions of the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (the "Act"), its lack of expertise in applying traditional copyright principles to cable television, and its limited statutory mandate to implement the provisions of the Act, has the authority to promulgate a binding regulation on the first impression question of the proper construction of Section 111(d) of the Act, which creates a copyright compulsory license for cable television.

2. Whether 37 C.F.R. § 201.17(b)(1), the regulation promulgated by the Copyright Office, is entitled to judicial deference under the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("Chevron"), in circumstances where the regulation extends the reach of the statutory scheme beyond that intended by Congress.

LIST OF PARTIES AND RULE 28.1 STATEMENT

The parties to the proceedings below were the petitioner Cablevision Company (plaintiff/appellant/cross-appellee below); the respondent Motion Picture Association of America, Inc. and its member companies Columbia Picture Industries, Inc., Embassy Communications, MGM/UA Entertainment Co., Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Turner Entertainment Company, Universal Pictures, and Warner Bros. Inc. (defendants/appellants below); the respondents Register of Copyrights and the Copyright Office of the United States Library of Congress (necessary party defendants/appellants below); and the National Cable Television Association, Inc., (plaintiff/appellee below). The following Amici supported the position of the respondents in the court below:

Major League Baseball
National Basketball Association
National Hockey League
National Collegiate Athletic Association
National Association of Broadcasters
American Society of Composers, Authors and Publishers
Broadcast Music, Inc.
Old-Time Gospel Hour
Public Broadcasting Service
National Public Radio
Canadian Broadcasting Corporation

Cablevision Systems Corporation is the parent company of petitioner Cablevision Company. A list of petitioner's subsidiaries and affiliates pursuant to Rule 28.1 of this Court is included in the Appendix hereto, pp. 84a-86a, *infra*.

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The petitioner Cablevision Company ("Cablevision") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") entered in the above-captioned proceeding on January 5, 1988.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 836 F.2d 599 (pp. 1a-35a, *infra*).

The opinion of the United States District Court for the District of Columbia (Green, J.L.) (the "district court") is reported at 641 F. Supp. 1154 (pp. 36a-59a, *infra*).

JURISDICTION

The consolidated actions of Cablevision and the National Cable Television Association, Inc. ("NCTA")[1] in the district court arose under 28 U.S.C. §§ 1338, 1400, 2201 and 2202. The counterclaims of the Motion Picture Association of America, Inc., *et al.* ("MPAA"), against Cablevision arose under 28 U.S.C. §§ 1331(a) and 1338(a). Review by the D.C. Circuit was sought pursuant to 28 U.S.C. § 1291. The decision of the D.C. Circuit was filed on January 5, 1988. The jurisdiction of this Court to review the judgment of the D.C. Circuit arises under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case of first impression involves the construction of the phrase "gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters" found in

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[1] NCTA also intends to file a petition for a writ of certiorari in this case. Pursuant to an Order signed by the Chief Justice on March 22, 1988, NCTA's time was extended to May 4, 1988.

Section 111(d)(2) of the Act, 17 U.S.C. § 111(d)(2) (Section 111 is at pp. 59a-73a, *infra*). The Copyright Office's construction of Section 111(d)(2) is found at 37 C.F.R. § 201.17(b)(1) (pp. 82a-83a, *infra*).[2]

STATEMENT OF THE CASE

In 1983 and 1984, Cablevision, an operator of cable television systems in New York and New Jersey, instituted two actions for declaratory and other relief in the district court, under 28 U.S.C. §§ 1338, 1400, 2201 and 2202, seeking judicial resolution of a dispute of first impression concerning the proper construction of Section 111(d)(2) of the Act. That section grants a compulsory license to cable operators for the carriage of television broadcast signals upon the semi-annual payment of royalties calculated pursuant to a statutorily-provided formula. The royalties, paid to the Copyright Office, are distributed each year by the Copyright Royalty Tribunal (the "CRT") to copyright owners filing claims. 17 U.S.C. §§ 111(d)(2), (4) and (5), and 801-810 (pp. 63a, 66a, 73a-81a, *infra*). In particular, Cablevision sought the district court's guidance to determine the revenue base against which this statutorily-provided formula is to be applied.

Both complaints alleged that Cablevision had been threatened with copyright infringement litigation by MPAA, one of the largest groups of copyright owners and recipient of a substantial portion of the royalties collected under Section 111(d)(2), on the ground that Cablevision was underpaying copyright royalty fees for the retransmission of broadcast signals and had, therefore, not qualified for the compulsory license. Under Section 111(d)(2)(B), the compulsory license fee paid by a cable system is calculated as a percentage of the system's "gross receipts

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[2] All unpublished legislative and administrative materials cited in this petition were reproduced in the Joint Appendix submitted to the D.C. Circuit.

from subscribers . . . for the basic service of providing secondary transmissions of primary broadcast transmitters."

Cablevision calculated and paid its semi-annual royalty fees on the belief that the "gross receipts" revenue base upon which the royalty percentage is calculated does not vary. This belief stemmed from the understanding that, by its reference to the "*basic service* of providing secondary transmissions," Congress intended that only revenues from a cable system's "basic service" tier, as it was then known in the trade, the lowest tier of programming provided to all subscribers, be used in the computation of the royalty. MPAA, on the other hand, contended that, whenever a cable system places a distant broadcast signal on a higher, optional tier of service, all revenues from that tier as well as the basic service tier must be included in the "gross receipts" fee base for calculation of the royalty, even though non-broadcast programming, for which a cable system pays copyright royalties outside the purview of the compulsory licensing scheme, may also be included on the higher, optional tier. It is the nature of this formula which has been in dispute in the litigation.

The origin of the controversy dates back to the passage of the Act in 1976 and the inclusion therein for the first time ever in a copyright statute of provisions creating a compulsory licensing system for cable television operators retransmitting broadcast programming. Prior to 1976, this Court had ruled, in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), that secondary transmissions of broadcast signals by cable systems were not subject to copyright protection.

Although Congress began to consider cable copyright issues as early as 1967, it did not pass legislation until 1976, after several attempts. One of the greatest difficulties faced by Congress was the impracticability of requiring

cable operators to negotiate directly with each of the thousands of copyright owners whose works were included in the broadcast signals being retransmitted. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 47, 89, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5703-04 (hereinafter, "H. Rep. at _____"). The lengthy legislative debate on the issue was fueled by extensive lobbying efforts in which MPAA and NCTA played central roles. Throughout the years, this debate dealt with the scope of the compulsory license, the adaptability of the royalty mechanism to future changes, and how great or small the royalty amount should be. *See* B. Ringer, *Second Supplementary Report to Congress*, Ch. V. The result of the process was a written compromise agreement between the motion picture and cable television industries, embodying a compulsory licensing mechanism, which was adopted by Congress as Section 111 of the Act[3].

The structure of Section 111 reflects the compromise. Under Section 111(c)(1), a cable system may retransmit, pursuant to a compulsory license, any broadcast signal that it is otherwise authorized to carry by the rules of the Federal Communications Commission ("FCC"), regardless

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[3] Congress intended a system under which "payments are modest and will not retard the orderly development of the cable television industry or the service it provides to subscribers." H. Rep. at 91. Congress predicted, at the time of enactment, that Section 111 would generate a royalty pool of $8.7 million for the first year. *Id.* at 175. Copyright owners received $12.6 million the first year. *See The Communications Act of 1979: Hearings on H.R.3333 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 684, 693 (1979) (the "*H.R.3333 Hearings*"). In 1979 and 1980, they received $18,572,623 and $19,532,881, respectively. *Oversight of the Copyright Act of 1976: Cable Television Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 111-12 (1981) (the "*1981 Oversight*"). In 1984, the royalty pool was $86,951,796. "Copyright Talks Flounder on Compulsory License Issue," *Cablevision*, March 10, 1986, at 11. In 1987, it exceeded $100 million. 8 *Communications Daily* No. 4, p. 3 (March 7, 1988).

of origin, without copyright liability. Under Section 111(d)(2)(B), the consideration for the license is payment of a statutorily-fixed royalty fee for the privilege of carrying distant, non-network programming that Congress recognized could cause harm to copyright owners if it went uncompensated. H. Rep. at 90. The fee must be paid by *all* cable systems regardless of whether they carry any distant broadcast signals. Sections 111(d)(2)(C) and (D); H. Rep. at 96.

For larger cable systems, such as those owned by Cablevision, Congress inserted into the industry compromise, at Sections 111(d)(2)(b)(ii)-(iv), a mechanism, called "distant signal equivalent" or "DSE," requiring additional royalty fees for each distant or non-local broadcast signal actually carried by the system. Depending on the type and number of distant signals carried, the DSE values differ. At the time of the enactment of Section 111, even though Congress and the industries were aware that "tiering" and other new marketing practices for cable services would develop,[4] all parties agreed that the proposed copyright royalty schedule did not attempt to approximate the compensation which copyright owners could have obtained had they negotiated the royalties in the marketplace.[5]

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[4] *See, e.g., Cable Television Syndicated Program Exclusivity Rules*, 79 FCC 2d 633, 807-08 (1980); *Micro Cable Communications Corp.*, 54 FCC 2d 888 (1975); *Establishment of Domestic Communications Satellite Facilities*, 35 FCC 2d 844 (1972); *Cable Antenna Television (CATV): Hearings Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92nd Cong., 1st Sess. 7, 21, 27 (1971) (statement of D. Burch, Chairman, FCC) (the "*CATV Hearings*"); *H.R.3333 Hearings* at 78 (testimony of T. Brennan, Commissioner, CRT). *See also National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1089 (D.C. Cir. 1982) (agreeing "tiering" was contemplated by Congress).

[5] H. Rep. at 96-97; *Oversight Hearings on Cable Television Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 104 (1977) (statement

Regardless of the number of distant signals carried by a cable system, Section 111 ties the royalty computation to the same revenue base: the "gross receipts from subscribers . . . for the basic service of providing secondary transmissions of primary transmitters." This precise language was used to describe the revenue base since the early copyright legislative proposals surfaced in 1969. *See* Amended S.543, 91st Cong., 1st Sess. § 111(d)(2)(A) (1969); S.644, 92nd Cong., 1st Sess., § 111(d)(2)(A) (1971); S.1361, 93rd Cong., 2nd Sess., § 111(d)(2)(B) (1973); S.22, 94th Cong., 1st Sess., § 111(d)(2)(B) (1975); H.R. 2223, 94th Cong., 1st Sess., § 111(d)(2)(B) (1975). This revenue base also tracks similar language found in legislative and administrative proposals regulating the minimum carriage requirements for broadcast signals on cable television systems which were contemporaneous with Congress' consideration of the cable copyright issue. *See* n. 18, *infra*. The revenue base is expressly tied to the cable operator's "basic service."

To implement the compulsory license, Congress created the CRT (pp. 73a-77a, *infra*), wholly independent of the Copyright Office, and explicitly delegated to it, not to the Copyright Office, the exclusive responsibility of distributing to copyright owners the royalties collected and adjusting the royalty rates to account for future economic conditions in the cable industry. *See* H. Rep. at 173-174. In determining whether to adjust the royalty rates in Section 111(d)(2)(B) and the "gross receipts" thresholds set forth in Sections 111(d)(2)(C) and (D), Congress directed the CRT to evaluate, among other things, "changes in the average rates charged cable system subscribers for the

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of J. Valenti, President, MPAA); *H.R.3333 Hearings* at 63 (statement of T. Brennan, Commissioner, CRT); *Copyright Law Revision: Hearings on H.R.2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 491-92 (1975) (statement of R. Bradley, Chairman, NCTA) (the "*H.R.2223 Hearings*").

basic service of providing secondary transmissions" to the extent that they result in reduced revenues (emphasis added).[6] Sections 801(b)(2)(A) and (D).

Periodic rate adjustments were to be based on changes in the average rates charged for "basic service" nationwide (Sections 801(b)(2)(A) and (D)) and could only be triggered by changes in the FCC signal carriage rules. Congress restricted the CRT's authority to changes in rates, and did not empower the CRT to tamper with the statutorily defined *revenue base* itself. An earlier version of Section 801 had contained a provision authorizing the CRT to "change the royalty rate or the basis on which the royalty fee shall be assessed or both" but Congress deleted it prior to final enactment of Section 111. *See* S.1361 at Section 801(b)(1).

In juxtaposition with the CRT's authority over rates, the Copyright Office was given the specific mandate only to require information from cable operators (Sections 111(d)(1), (2)(A)) and to receive the royalties paid by the operators (Section 111(d)(3)), which are to be deposited, along with a statement of account, "in accordance with requirements that the Register shall, after consultation with the [CRT], prescribe by regulation." Section 111(d)(2). The Copyright Office's primary role in connection with Section 111 has been to receive statements of account and

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[6] Congress gave the CRT these adjustment powers to counteract the reduction in copyright royalty fees that might result from any decrease in *basic service* (*i.e.*, lowest tier) subscriber charges. H. Rep. at 175. Congress allowed the CRT to consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions. Section 801(b)(2)(A). Under well-established FCC policy at the time, state and local rate regulating authorities were not permitted to regulate any rates charged by cable operators *except* those charged for the first tier. *See Community Cable TV, Inc.*, 95 FCC 2d 1204 (1983), *aff'd*, 98 FCC 2d 1180 (1984).

collect royalty payments. Under Section 702 (p. 73a, *infra*), the Register has the authority to adopt regulations "for the administration of [these] functions and duties." The Copyright Office has no power to enforce the copyright laws or to give legal opinions or advice on matters dealing with the sufficiency, extent or scope of compliance with the copyright law. Copyright Office Circular R1b (March 1979); 37 C.F.R. § 201.2(a)(3)(1984) (p. 82a, *infra*); *Notice of Final Regulations in Docket RM 79-4*, 45 Fed. Reg. 45270, 45271 (1980).

Relying on the express language of the statute, its legislative history, and contemporaneous regulatory developments by the FCC affecting cable, Cablevision sought from the district court a declaration that its construction of the term "basic service" and, consequently, the statutory revenue base, was proper. The complaint prayed that, without an adjudication of this issue, Cablevision would be placed in continued uncertainty as to its obligations under the Act to its peril. MPAA filed counterclaims against Cablevision alleging infringement of thousands of copyrights owned by its member companies and seeking damages of up to $50,000 per work infringed. In light of the number of secondary broadcast transmissions made over a typical cable system, Cablevision's potential infringement liability could be in the range of billions of dollars.

In September, 1983, NCTA, a major trade association for cable television operators, filed a similar action. Claiming a court adjudication on this issue was necessary to end the *in terrorem* effect on the industry of MPAA's consistent threats of infringement litigation to operators who did not acquiesce to MPAA's construction of the Act, NCTA took yet a third position on the issue—if a tier of programming offered by a cable television operator consists of both broadcast and non-broadcast signals, the operator may allocate all of its revenues from that tier among the various signals and include in its revenue base only that portion attributable to broadcast signals.

In April, 1984, aware of the pending litigation, without discussing in any detail the legislative history of Section 111, and willing to allow the courts to be "the final arbiters of what the law means," the Copyright Office promulgated a self-styled "interpretive" regulation, 37 C.F.R. §201.17(b)(1), adopting the MPAA position. *Notice of Final Regulations in Docket RM 80-2*, 49 Fed. Reg. 13029, 13031 (1984) (the "*NFR*"). The *NFR* did not directly address Cablevision's construction of the Act and, prior to its 1984 pronouncement, there had been no regulation on this issue. The parties disagree as to whether the Copyright Office had ever before taken a position on the issue.

The issuance of the regulation, adopted eight years after the enactment of the Act, six years after it went into effect and nearly a year after Cablevision sought a judicial declaration on the proper construction of the Act, caused the district court, on July 17, 1984, to order the Copyright Office involuntarily joined as a necessary party defendant to the NCTA action. The Copyright Office claimed judicial deference for its 1984 interpretation. Cablevision and NCTA challenged the Copyright Office's authority to issue a binding regulation interpreting the statutory revenue base. On February 13, 1985, the Cablevision and NCTA actions were consolidated.

Declining to defer to the Copyright Office's construction of the Act on the ground that it did not "have a reasonable basis in law and frustrates the underlying congressional policy" (p. 48a, *infra*), the district court adopted NCTA's construction of Section 111(d). Of particular importance, the district court refused to accord any significance to, or even mention, Cablevision's submission of 27 industry-member affidavits offered to establish that the term "basic service," integral to the statutory phrase in question, had a specific industry meaning at the time of the passage of the Act. Nor did the court agree with Cablevision that the FCC's regulatory scheme with respect to the provision of "minimum" or "adequate" service by cable operators, as

that scheme existed in 1976, provided to Congress an awareness of what was regarded as "basic" cable service. *See* p. 52a, *infra*. Instead, the district court adopted a post-enactment definition of "basic service" developed in *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077 (D.C. Cir. 1982), in the unrelated context of a copyright royalty distribution controversy not involving the construction of Section 111(d). *Id.*

Cablevision, MPAA and the Copyright Office filed appeals to the D.C. Circuit. At respondents' urging, the D.C. Circuit found that the Copyright Office had the authority to issue a regulation interpreting Section 111(d) and, *solely* in the context of Section 111, was due judicial deference under the principles stated by this Court in *Chevron*. Significantly, the D.C. Circuit agreed that Cablevision's understanding of the term "basic service" was an understanding shared by Congress in 1976 (p. 10a, *infra*)

> an examination of the reports on the legislation evokes a fairly sharp image of the model that Congress had in mind at the time of enactment. According to that picture, the cable subscriber had available from the system a single package for a flat fee containing a number of retransmitted broadcast signals and some channels produced just for cable—the "basic service" that every subscriber received—and beyond that, individually priced specialty channels available only on cable from which the subscriber to the basic service could pick and choose .... In this paradigmatic case, the definition of gross receipts from basic service was simple; gross receipts were the flat fee for the initial package ....

The meaning of gross receipts only became problematic, the court said, after the enactment of the Act "as reality

diverged from the model on which the Act was based" (p. 11a, *infra*). Despite Cablevision's submission of legislative, administrative and judicial support for the contrary proposition (see n. 4, *supra*), the D.C. Circuit concluded that Congress never considered the development of "tiering" practices by cable operators (pp. 27a-28a, *infra*).

In light of this, the court ended its analysis under the first prong of *Chevron*—whether Congress has spoken on the precise issue at hand—concluding, without any discussion or citing any support from the legislative history, that Congress "saw a need for a continuing interpretation of Section 111 and gave the Copyright Office the statutory authority to fill that role" (p. 21a, *infra*). It then proceeded to analyze the case under the second prong of *Chevron*—is the Copyright Office regulation a reasonable interpretation of the Act? Finding that "Congress never contemplated a precise congruence of the royalties paid and the amount of distant . . . programming actually carried" and that Congress had actually picked a "convenient revenue base" (p. 23a, *infra*), the D.C. Circuit declared the Copyright Office's non-contemporaneous regulation to be reasonable and entitled to deference (p. 30a, *infra*).

REASONS FOR GRANTING THE WRIT

Prior to the D.C. Circuit's decision in this case, no federal court had given deference to a first impression statutory interpretation of the Copyright Office in areas other than the registrability of copyrights. Indeed, in the two cases discussed by the D.C. Circuit where the issue of deference was raised, this Court and a circuit court refused to defer to a Copyright Office interpretation of the Act for reasons which are quite applicable to this case. To reach the same result in this case would not only provide for uniformity in principle of decisions in this area, but would be the only approach consistent with

this Court's pronouncement in *Chevron*. This Court's intervention is also required to ensure that Congress' intent at the time of the enactment of Section 111, and not the later-found accommodation of policies undertaken by the D.C. Circuit, is effectuated.

The decision of the D.C. Circuit has implications which transcend the interests of the parties to this case. It may have extended dramatically the Copyright Office's limited powers to implement the substance of the cable television compulsory licensing system under the guise of "construing" the terms of the Act. If allowed to stand, this decision can be expected to result in new, more overt attempts by the Copyright Office, at the copyright owners' insistence, to rewrite the 1976 industry compromise that led to enactment of the Act. While Section 111 was designed to achieve a compromise between the two industries and preserve a very delicate balance, the agency entrusted to administer the cable television compulsory licensing scheme admits to a belief that it has a near-constitutional mandate to represent solely the interests of the copyright owners. The D.C. Circuit's decision to vest broad power in a biased agency will create additional cost and uncertainty to the cable industry. It will both increase copyright royalty payments on a semi-annual basis and expose cable operators to copyright infringement actions by copyright owners who may seek billions of dollars in statutory damages from any cable system that advances a construction of its license obligations less onerous to it than the copyright owners' interpretation.

I. THE DECISION OF THE D.C. CIRCUIT IS INCONSISTENT IN PRINCIPLE WITH DECISIONS OF THIS COURT AND ANOTHER CIRCUIT REGARDING THE DEFERENCE TO WHICH THE COPYRIGHT OFFICE IS ENTITLED.

In an unprecedented fashion, the D.C. Circuit has enlarged the traditionally limited power of the Copyright Office to construe the Act and issue binding regulations

based on such construction. Until the decision below, there had been no reported instance where a court has deferred to the Copyright Office in any matter not involving the issue of "copyrightability."[7] On such matters, the Copyright Office has always had express enforcement powers under the copyright laws through its power to refuse registration. The ruling below, vesting the Copyright Office with equally broad authority to construe Section 111, conflicts in principle with this Court's decision in *DeSylva v. Ballentine*, 351 U.S. 570 (1956) and the Second Circuit's decision in *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (1975).

DeSylva involved the issue of whether the illegitimate child of a deceased author had any right to renew copyrights owned by the author during the lifetime of the author's widow. The courts below had disagreed on the answer to the statutory construction issue of whether both the widow and the child or only one of them were entitled to ownership of the copyrights upon the author's death. This Court, after acknowledging that the Copyright Office had a longstanding practice, refused to defer to the Copyright Office's construction because it was "more the result of a decision that there is substantial doubt over the question, rather than the result of a confident interpretation of the statute." 351 U.S. at 572. The Court proceeded to determine the issue using traditional statutory construction tools.

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[7] The Copyright Office has sometimes been accorded deference in the one area over which it has always had unquestioned authority under both the current and preceding copyright acts: copyrightability. *See Mazer v. Stein*, 347 U.S. 201 (1954); *Norris Industries v. ITT*, 696 F.2d 918 (11th Cir. 1983); *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Esquire v. Ringer*, 591 F.2d 796 (D.C. Cir.), *cert. denied*, 440 U.S. 908 (1978); *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978). In all of these cases, the courts noted both the Copyright Office's decades of experience, and the fact that Congress had approved and ratified the Office's position when it revised the copyright laws in 1976.

Similarly, in *Bartok*, the Second Circuit refused to adopt the Copyright Office's definition of the statutory term "posthumous work." Since the Copyright Office itself had in its regulations recognized that it had no authority to give legal opinions or define legal terms, the Second Circuit followed this Court's decision in *DeSylva* and held that the Copyright Office's interpretation of an issue *never before* decided should not be given controlling weight. This was particularly so since the Copyright Office had proclaimed itself to be primarily an office of record; merely a place where claims to copyrights are registered.

The D.C. Circuit was controlled by *DeSylva* and should have been persuaded by *Bartok*. The D.C. Circuit, in fact, agreed (p. 20a, *infra*) that "the Copyright Office in this case may have come close to the point of excessive diffidence" which had prevented deference to its interpretations in *DeSylva*. Yet, the D.C. Circuit failed to give due regard to, or even mention, the substantial record containing almost every possible indicia that the Copyright Office, until it became a party to this litigation, did not expect and could not have expected judicial deference. There was no indication in the record before the court that the Copyright Office's 1984 regulation construing Section 111(d) was anything other than the "result of a decision that there is substantial doubt over the question, rather than . . . a confident interpretation of the statute" on an issue "never before decided." In refusing to follow these precedents, the D.C. Circuit created a "new" Copyright Office with broad authority to construe the Act and, in the process, to modify the compromise embodied in Section 111.

II. CONGRESS DID NOT CHARGE THE COPYRIGHT OFFICE WITH OTHER THAN MINISTERIAL DUTIES UNDER SECTION 111 AND, THUS, THE D.C. CIRCUIT ERRED IN DEFERRING TO IT.

The Act confers only the most limited rulemaking power on the Copyright Office. The Copyright Office is not the

typical administrative agency; it is an "office" within the Library of Congress, functioning primarily to register and record copyrighted works, and to administer the clerical functions of the compulsory license mechanism established by the Act. While, under Section 702, the Register has the authority to adopt regulations "for the administration of [his] functions and duties," these functions and duties are specified in detail throughout the Act and are quite limited and purely "administrative" (37 C.F.R. § 701; p. 73a, *infra*).[8] As the Copyright Office itself has repeatedly acknowledged, it has no power to enforce the copyright laws, or even to issue legal opinions in compliance with those laws. *See* p. 8a, *supra*. The Copyright Office's "general" rulemaking powers under Section 702 cannot extend to a "function[] [or] dut[y]" that is explicitly beyond Office's authority.

In the compulsory licensing area, the Copyright Office has equally narrow regulatory powers, enabling it to administer, but not to alter, the detailed compulsory licensing scheme created by Congress.[9] The authority

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[8] *See, e.g.*, 17 U.S.C. §§ 108(d)(2), 108(e)(2), 110(4)(B)(iii), 115(b)(1), 203(a)(4)(B), 304(c)(4)(B), 411(b)(1), 302(d), 408(d), 409 (prescribe forms and the contents of statutory notices); 707(b) (publish brochures and bibliographies); 708(b) (waive agency fees); 205(b), 302(c) and (d), 304(c)(4)(A), 508(c), 705(a) (record keeping duties); 116(c)(1), 118(b)(2) and (e), 407(c), 408(c), 704(b), 706(b) (collect and handle royalty and document deposits); 116(b)(1)(A) and (B) (handle filing of jukebox license applications and issue certificates); 115(c)(3) and (4) (collection of phonorecord payments and statements of account); and 304(a), 410, 707(a) (issue registrations and catalogue them).

[9] In the various rulemakings regarding Section 111, the Copyright Office has concluded that the Act would not permit any adjustments in the statutory formula other than those expressly provided for. It has stressed the specificity of the Act, the lack of extensive authority granted to it, and the underlying assumption of Congress that the compulsory license royalty is primarily a fee for the privilege of retransmitting broadcast signals, not a payment for actual transmissions. *Notice of Final Regulations in Docket RM 79-4*, 45 Fed. Reg.

conferred on the Copyright Office relates strictly to compulsory license filing procedures and information-gathering.[10] Senior officials of the Copyright Office have acknowledged that the Office functions mainly as an office of record. Ladd, Schrader, Leibowitz, and Oler, "Copyright, Cable, the Compulsory License: A Second Chance," *Communications and the Law*, Summer 1981, at 3, 14. The Copyright Office's rules merely govern the form, content, and timing of filings which the Act requires cable operators to make; the Office has recognized that its regulatory authority extends no further.[11]

The Office acknowledged the non-binding nature of the regulation involved in this litigation when it labelled it

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45270, 45271-45272 (1980); *Notice of Interim Regulations in Docket RM 80-2*, 47 Fed. Reg. 21786, 21788-21789 (1982); *NFR* at 13035.

[10] Section 111(d)(1) requires any cable operator to provide notice and information to the Copyright Office about secondary transmissions carried by the system. The operator must also furnish "such further information as the Register of Copyrights, after consultation with the [CRT] . . . . shall prescribe by regulation to carry out the purpose of the clause". Subsection (d)(2) requires the semiannual deposit of a statement of account and royalty fee "in accordance with requirements that the Register shall . . . prescribe by regulation" after consultation with the CRT. The statute specifies both the royalty fee formula, and certain information to be provided on the statement of account. Subsection (d)(2)(A) authorizes the Register to require disclosure of "other data" on the account form. The royalty fee provision (subsection (d)(2)(8)-(D)) contains no specific reference to rulemaking power.

[11] The Copyright Office has consistently stated that the "principal obligation for enforcement of . . . Section 111 rests with the affected copyright owners, not the Copyright Office." *Notice of Final Regulations in Docket RM 79-4*, 45 Fed. Reg. 45270, 45271 (1980). Any enforcement activity, beyond the correction of "obvious errors and omissions" in submissions by cable systems, "would be beyond our statutory authority." *Id.* The Copyright Office's own rules make clear that acceptance of statement of account filings done by cable operators "shall in no case be considered a determination that . . . any . . . requirements to qualify for a compulsory license have been satisfied." 37 C.F.R. § 201.17(c)(2) (1987) (p. 83a, *infra*).

"interpretive" and "welcome[d] the guidance of the courts" on this issue as "the final arbiters of what the law means." *NFR* at 13031. Given the undisputed facts that the Copyright Office has no power to enforce its own construction of Section 111 or to even provide legal advice as to how compliance with Section 111 may be accomplished, the attribution by the D.C. Circuit of broad rulemaking powers under Section 111 is unfounded.

The Copyright Office regulation is also lacking in "those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As the then Register of Copyrights, Barbara Ringer, testified before Congress, the Office is a biased agency—it represents the interests of copyright owners:

> My feeling as the head of the Copyright Office is that my responsibility is to one group and one group only, and that is the group that is identified as the sole and only beneficiary of the copyright law of the United States under the Constitution, the authors of the so-called writings. In other words, the creator of copyrighted works.

H.R. 2223 Hearings at 106.[12] Its 1984 interpretation is not a contemporaneous construction of the Act, consistently

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[12] It was, thus, the responsibility of the D.C. Circuit to enforce the industry compromise:

> [W]here a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. An agency that may be dominated by one faction in the legislative struggle that led to enactment of a compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of the other faction. The court must enforce the compromise, not the maximum position of one of the interest groups among which the compromise was struck.

applied, thoroughly considered, and validly reasoned. The regulation—promulgated eight years after enactment of the statute—followed several years during which the Office either avoided or expressed contradictory views on the tiering issue.[13] Since the cable television compulsory license was the result of an industry compromise in a highly technical area never before regulated by the Office, there is little support for a finding of agency "expertise."[14]

Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983). The Copyright Office has shown remarkable consistency in upholding the positions advanced by MPAA in successive rulemakings involving Section 111. Cablevision can only note the obvious closeness of interest and frequency of contact between the Copyright Office and copyright owner interests over the years. *See, e.g.*, Memorandum from Fritz Attaway to members of the Cable Copyright Committee (November 30, 1977) (enclosing prepublication copy of Copyright Office Notice of Proposed Rulemaking in Docket No. 77-2, and noting "private[ ]" views of agency on part of proposal); Memorandum from Becky Raphael, MPAA, to Jon Baumgarten, *et al.*, Copyright Office (December 21, 1978) (thanking agency staff for "consideration and help" in making cable system reporting data available to MPAA). MPAA has frequently employed departing Copyright Office personnel responsible for cable matters.

[13] *See Notice of Final Regulations*, 45 Fed. Reg. 45270, 45273 (1980). The Office's inconsistent understanding of Section 111 was also highlighted in 1981 Copyright Office testimony before Congress recommending that Section 111 be abolished or modified—in part because it did *not* require cable systems to pay royalties based on revenues from *higher* programming tiers that included broadcast signals, the position taken by Cablevision since 1978 and now disavowed by the Copyright Office. *See 1981 Oversight* at 135 (statement of D. Ladd, Register of Copyrights).

[14] The Office had before it the analysis of its hired consultant, Charles Woodard, that "basic service," as used in Section 111, should be construed "in accordance with industry practice and FCC rules and regulations" to include revenues for services provided to all subscribers, but not other revenues, such as pay cable, which were clearly distinguished by FCC rules. Memorandum of Charles Woodard Addressing Issues in Docket RM 77-2 (Attachment to Memorandum from Joan

The *NFR* did not discuss the extensive legislative history surrounding Section 111. It also did not address Cablevision's statutory construction based on the express language of the statute or the alleged trade meaning of the term "basic service," evidence of which Cablevision had submitted to both courts below.[15] The Copyright Office has, in fact, yet to explain what "basic service" means in the statutory context.[16] Moreover, while the Copyright Office found it had authority to construe statutory terms, the bases for that authority are barely discussed. In the *NFR*, the Copyright Office did not claim any "expertise" in the cable copyright field.

Doherty, Head, Task Group on New Functions, to Jon Baumgarten, General Counsel, Copyright Office (August 1, 1977)) at 31-32. This analysis, which reflects Cablevision's position, was unaccountably omitted from the Copyright Office "record" below, and is not discussed in the Office's decision.

[15] The rationale of the *NFR* in adopting the copyright owners' interpretation was that proration or allocation of gross receipts (the position espoused by NCTA) is not permitted by Section 111. This rationale has no applicability to Cablevision's construction, which is not grounded on a "proration" theory but rather, on the convenience and practicality that Congress saw in selecting "basic service" as the revenue base for the royalty calculation.

[16] Nowhere in the entire record submitted below by the Copyright Office, or in any of its regulations or comments, is there any indication that, in its consideration of tiering, it even *asked* the obvious threshold question: What did Congress mean by the term "basic service"? Considering the importance that the Copyright Office attaches to the plain language and literal meaning of the Act in other contexts, the failure to consider this question deserves attention. The lack of discussion is all the more peculiar in light of the Office's own use of the term "basic service" specifically to refer to the first tier of service. *See, e.g.*, Letter from Willie A. Adams, Senior Examining & Processing Technician, Copyright Office, to James F. Ackerman, Connersville Cable TV, Inc. (November 5, 1980) (Copyright Office Record at 2033); Letter from Patricia K. Johnson, Senior Examining & Processing Technician, Copyright Office, to Donna C. Gregg, Dow, Lohnes & Albertson (July 20, 1982) (Copyright Office Record at 2035), which were submitted to both courts below.

With virtually all the indicia traditionally associated with judicial deference to an administrative interpretation of a controlling statute absent, this case falls within the zone of doubtful, first impression agency interpretations considered in *DeSylva* and *Bartok*. In failing to recognize the controlling nature of these cases, the decision of the D.C. Circuit creates irreconcilable tension.

III. THE DECISION OF THE D.C. CIRCUIT RAISES SIGNIFICANT QUESTIONS REGARDING THE SCOPE OF THIS COURT'S DECISION IN *CHEVRON* AND THE ROLE OF COURTS IN GIVING EFFECT TO CONGRESSIONAL INTENT.

In light of the unusual circumstances surrounding the promulgation of the Copyright Office regulation and the lack of a persuasive history of deference to such regulations by the courts, the ruling of the D.C. Circuit conflicts with this Court's pronouncement in *Chevron*. Neither *Chevron* nor any subsequent decision of this Court applying *Chevron* has involved a largely clerical "office," with no broad statutory delegation of power, no specific statutory mandate to exercise discretion in the implementation of the statute, no enforcement powers or substantive expertise on the matters in question, and which issues a non-contemporaneous, interpretive ruling embodying a policy that is not the result of consistent agency practice.[17] The

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[17] This Court's application of *Chevron* has involved statutes vesting broad delegation to an agency to implement equally broad and complex Congressional purposes, where the agency's interpretation has been longstanding or consistent and it was evident that Congress chose a regulatory approach to the subject. *See, e.g., Atkins v. Rivera*, 477 U.S. 154 (1986); *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986); *United States v. City of Fulton*, 475 U.S. 657 (1986); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524 (1985). *Cf. Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986), and *Securities*

D.C. Circuit ruling extends *Chevron* to the point where it erases longstanding principles of statutory construction and deference which *Chevron* was not meant to disturb.[18]

The D.C. Circuit found Congress' intent at the time of enactment: to calculate the royalty payments based on revenues collected from the "basic" or first tier of service. *See* p. 10a, *supra*. This should have been the end of the analysis under the first prong of *Chevron*. The court, instead, considered the argument that the "marketplace" in which cable systems operate has changed since 1978. *See* p. 11a, *infra*. Unable to make Congress' intent meet the present "marketplace," the D.C. Circuit presumed, without citation to or support in the Act, its legislative history or case precedent, that Congress must have also intended to

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Industry Ass'n v. Board of Governors of Federal Reserve System, 468 U.S. 137 (1984), where this Court declined to exercise deference to agency regulations.

[18] The decision below does not effect the Congressional intent embodied in the term "basic service," fails to ascribe a meaning to each word in Section 111(d)(2), ignores the trade meaning of the critical statutory terms, and fails to look *in pari materia* at the interplay between FCC regulation of cable and the Congressional efforts to pass cable copyright legislation. Before and after *Chevron*, statutory construction has always been the ultimate responsibility of the courts and deference has never been intended to substitute for thorough judicial review of administrative actions. *See Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 468 U.S. 137 (1984); *Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Zuber v. Allen*, 396 U.S. 168, 193 (1969). Had the D.C. Circuit undertaken a more searching review, it would have concluded that *Chevron* was not meant to require deference to an agency in a case like this one, which presents a first impression issue of the proper construction of a statute. In *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1220-21 (1987), this Court suggested that, in such a case, a court, faced with "a pure question of statutory construction," may substitute its interpretation for that of an agency. Contrary to the opinion of the D.C. Circuit (pp. 16a-17a, *infra*), in *NLRB v. United Food and Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987), the majority of this Court did not retreat from that proposition.

allow the Copyright Office to change the "basic service" revenue base to reflect marketplace developments.[19]

This ruling, which is facially erroneous in light of the undisputed fact that the political compromise embodied in Section 111 did not, as it could not, mirror the marketplace (p. 5 n.5, *supra*), distorts, to the point of near extinction, the first prong of *Chevron*. It sets the precedent that Congress' intent, once found, need not be effected if the court or an agency deems such intent to be outmoded. It allows an agency to modify critical statutory terms, which Congress took great pains to detail, without the delegation of authority to do so. It permits courts to impute to Congress an intent to delegate power to an agency without any evidence in the controlling statute or its legislative history that Congress intended to do so. This significant extension of *Chevron* merits the Court's attention.

The D.C. Circuit ruling also raises legitimate questions regarding the propriety of exercising judicial deference in circumstances where there is substantial indicia that an agency's regulation extends the reach of its statutory mandate beyond that intended by Congress. Cablevision submitted to both courts below legislative, regulatory and affidavit evidence supporting the proposition that "basic service," the crucial term in the statutory description of the royalty revenue base, had an established meaning dur-

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[19] One of the justifications for exercising deference under *Chevron* is that Congress delegated power to the agency to choose among competing policies. 467 U.S. at 844-845. In this case, Section 111 was the result of a hard-fought compromise between copyright owners, whom this Court had said had no copyright protection for cable retransmissions, and cable operators, who were freely retransmitting programming without compensating the owners. The industry compromise—as any compromise would do—created the desired balance among these competing interests. To conclude otherwise, as did the D.C. Circuit, is to erase the compromise nature of Section 111 and to forget the historical bargaining positions of the industries involved at the time of the enactment.

ing the time Congress was considering Section 111 and that Congress intended to adopt that meaning. Behind the shield of *Chevron*, the D.C. Circuit largely ignored that evidence.

Despite the multiplicity of viewpoints expressed by interested persons after Cablevision filed suit in the district court, Cablevision's construction of Section 111 is fully supported by both the plain meaning and the legislative history of the Act.[20] As confirmed by 27 affidavits submitted without disinterested party disputation in the district court,[21] when Congress used the term "basic service" to define the revenue base, the term and its synonyms had a universally-accepted meaning within the cable in-

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[20] Even MPAA agreed that, at the time Congress adopted Section 111 in 1976, "basic service" meant what Cablevision said it meant.

> [W]hen we reached the famous agreement that eventually led to the adoption of Section 111, . . . there was obviously a discussion of what revenues constitute basic revenues . . . and . . . it was accepted by all of this [sic] at the time that the basic revenues were the revenues from the so-called basic package of programming.

Deposition of F. Attaway, Vice President, MPAA, May 22, 1986, Tr. at 152.

[21] The industry witnesses testified in almost identical words that:

> Between the year 1970 and 1976, the term "basic service" had a recognized meaning within the cable television industry. It was the lowest tier of service offered by a cable television system, to which all subscribers were required to subscribe before they were permitted to subscribe to any additional tiers of service. The term "basic service" was synonymous with and used interchangeably by the industry with such terms as "minimum level of service," "initial package" and "regular subscriber service."

See also H. Rep. at 88 (in describing a cable system, Congress acknowledged that "[i]n addition to an installation charge, the subscribers pay a monthly charge for the *basic service* averaging about six dollars. A large number of these systems provide automated programming . . . [and] also originate programs . . . . ") (emphasis added).

dustry and the FCC, the only federal agency to have and exercise regulatory and surrogate copyright policy power during cable's early development.[22] In large part taking the cable marketplace as it found it, Congress structured the compulsory license provisions of the Act to guarantee a fixed revenue base from the "basic" tier, with fixed

[22] The term "basic service," as used by Congress in the copyright context, dates back to 1969, when S.543, a comprehensive copyright revision bill, was introduced. Throughout the succession of bills that followed, up to enactment of the Act in 1976, Congress used the phrase "basic service of providing secondary transmissions" to describe the revenue base upon which cable compulsory license fee calculations were to take place. *See* p. 6, *supra*.

The use of this specific language was triggered in part by the development during the same time period by the FCC of signal carriage rules that required or permitted cable operators to provide subscribers with sufficient television signals to constitute a defined "adequate service." This concept was referred to variously as "minimal level of service," "initial package" and "regular subscriber service," and ultimately became known in the trade as "basic service." *See Cable Television Syndicated Program Exclusivity Rules*, 79 FCC 2d 663, 816-26 (Appendix A) (1980); *Cable Television Report and Order*, 36 FCC 2d 143 (1972); *Cable Proposals*, 31 FCC 2d at 115, 116, 120 (1971); *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417, 429, 431-32, Appendix C at 461 (1968); *Second Report and Order*, 2 FCC 2d 725 (1966); *First Report and Order in Dockets 14895 and 15233*, 38 FCC 683 (1965); *Hearings on S.1361 Before the Senate Subcomm. on Patents, Trademarks and Copyrights*, 93d Cong., 1st Sess. 312 (1973) (statement of J. Valenti, President, MPAA). Applying the doctrine of *in pari materia*, it would have been proper for the D.C. Circuit to consider the interplay between the FCC regulatory environment and the developing copyright policy. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 112-13 (1948); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47-8 (1928)

Congress was not unaware of the manner in which the FCC had affected the development of the cable television industry and closely coordinated its statutory language with the FCC's communications policies. H. Rep. at 89. In that light, it is not surprising that Congress based the CRT's powers to revise rates on FCC regulatory changes and trends in operators' "basic service" (p. 7, *supra*).

adjustments in royalties, through the DSE mechanism, depending on the number of imported signals carried by the system. To provide for flexibility in the royalty scheme, it delegated authority to the CRT to adjust royalty rates. *See* p. 6, *supra*. Thus, the characteristics of the Copyright Office interpretation found persuasive by the D.C. Circuit—the lack of congruence between signals carried and royalties paid, and the convenience of a fixed revenue base—are also integral to Cablevision's position.

This Court's decisions establish that, absent express legislative intent evidencing another meaning, trade terms are presumed to be employed in statutory language with the meaning ascribed to them in trade usage at the time of the passage of the act. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 201-02 (1974); *United States v. Stone & Downer Co.*, 274 U.S. 225, 239, 247 (1927); *O'Hara v. Luckenback S. S. Co.*, 269 U.S. 364 (1926); *Seeberger v. Cahn*, 137 U.S. 95, 98 (1890); *Worthington v. Abbott*, 124 U.S. 434, 436 (1888); *Miller v. Butterfield*, 125 U.S. 70, 75 (1888); *Tyng v. Grinnell*, 92 U.S. 467, 469-70 (1876). The D.C. Circuit erred in not following these precedents.

While technological developments since the enactment of the Act have made additional programming available and allowed cable operators flexibility in packaging the traditional basic tier of service, the statutory scheme, which Congress and the industries affected took great pains to delineate to the most minimal detail, continues to tie the revenue base to "basic service."[23] The D.C. Circuit, through the exercise of deference to the Copyright Office, cannot

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[23] It is unlikely that Congress would have taken the time to delineate with specificity the extent of the CRT's powers to increase the amount of royalties collected and then left it to the Copyright Office to determine the most critical issue of which revenue base would be applicable. This is particularly unlikely in light of the fact that, by rejecting provisions in previous bills which would have allowed the CRT to revise the revenue base (p. 7, *supra*), Congress expressed its intent to retain full control over the revenue base and account for future changes solely through rate adjustments.

modify this express statutory mandate and adopt what it considers to be a more suitable, practical or convenient revenue base on the ground that changes in the cable marketplace may have altered the content of the basic service. The issue in this litigation is not which compensation is adequate, as the decision below suggests, but, rather, which compensation was intended by Congress. The D.C. Circuit had no support for allowing the Copyright Office to write the term "basic service" out of the statute and adopt a definition of the statutory revenue base which is inconsistent with the express language of the Act and its underlying legislative history.[24]

If Section 111 is not a satisfactory answer to the cable copyright problem, redress may be sought from Congress. The two industries have, in fact, variously attempted to do so since 1978. It is, however, beyond the powers of courts and agencies to rewrite a clear statute because there may be a better approach to the problem at that time. *See generally Lyng v. Payne*, 106 S. Ct. 2333, 2341 (1986); *Louisiana Public Service Comm'n v. FCC*, 106 S. Ct. 1890, 1901-02 (1986); *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Miller v. United States*, 294 U.S. 435, 439-440 (1935) *United States v. United Verde Copper Co.*, 196 U.S. 207 (1905); *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1152 (D.C. Cir. 1980). This novel reallocation of legislative power sanctioned by the D.C. Circuit poses an important question, which this Court should address.

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retain full control over the revenue base and account for future changes solely through rate adjustments.

[24] It is a cardinal principle that statutes are to be interpreted so that no word is rendered superfluous. *See, e.g., United States v. Smith*, 553 F.2d 1239, 1242 (10th Cir. 1977); *Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971); *Klein v. Republic Steel Corp.*, 435 F.2d 762, 766 (3rd Cir. 1970).

IV. THE DECISION OF THE D.C. CIRCUIT DRAMATICALLY ENHANCES THE IMBALANCE BETWEEN CABLE AND COPYRIGHT INTERESTS IN THE FUTURE ADMINISTRATION OF SECTION 111.

The definition of the revenue base under Section 111(d)(2)(B) is key to a determination of cable operators' liability for royalties under the Act. When Section 111 was enacted, Congress and the industries affected hoped to create a modest, affordable pool of $8.7 million in royalties for distribution among copyright owners. H. Rep. at 91. Annual copyright royalties collected at the present time under Section 111 exceed $100 million and all Congressional expectations. The Copyright Office/MPAA construction of Section 111(d) cost the cable industry an additional $40 million this past year alone. 8 *Communications Daily*, No. 4, p. 3 (March 7, 1988). These windfall payments will continue to grow, year after year, as the gross receipts of cable operators increase.

The exorbitant cost of the copyright compulsory license under Section 111 is becoming a significant factor in cable operators' marketing determinations. Excessive copyright liability is already resulting in decisions by cable operators to curtail carriage of broadcast signals on their systems unless the broadcast stations are willing to pay for the added copyright liability resulting from such carriage. Excessive royalties will ultimately necessitate higher subscriber fees for cable programming, particularly now that almost total rate deregulation under the Cable Communications Policy Act of 1984, 47 U.S.C. § 543, has come into effect. All these factors adversely affect the goal of diversity of viewpoints and programming which the FCC, under the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*, has traditionally undertaken to promote in the public interest.

Section 111 was not designed as, but is rapidly becoming, a measure to vest in the Copyright Office the ability to regulate the development of cable television. The sudden attribution to the Copyright Office of expansive substantive authority to construe Section 111, and the resulting judicial deference to it, will create an administrative nightmare for the cable television industry. MPAA and other copyright owners will continue to ask the Office to expand the statutory scheme for their benefit through the issuance of substantive regulations.

Attempts in that direction were, in fact, quick to follow the D.C. Circuit's decision. MPAA asked the Copyright Office to issue a regulation requiring that any underpayments of cable copyright royalties during the pendency of this proceeding be made up *with interest*. The main issue presented to the Court in this case will again be determinative—even though neither Section 111 nor its legislative history mentions the collection of interest, does the Copyright Office have the power to construe the statute so as to issue a binding regulation assessing interest on multimillion dollar payments to be made by cable operators? Unless the Court settles the matter, the D.C. Circuit's decision will provide the bases for the continued and unwarranted expansion of Copyright Office powers, which Congress specifically limited in the Act, and will ultimately provide copyright owners with the tools to unilaterally rewrite the 1976 industry compromise.

Enormous liabilities will flow from the decision below beyond increased royalty payments. As the Copyright Office ventures into exercising its newly-found powers, the exposure of cable operators to infringement actions founded on Copyright Office interpretations of Section 111 advanced after infringement litigation has commenced, with potential resulting liability in the billions of dollars, will concomittantly escalate. Copyright owners will continue to threaten cable operators with infringement litigation based on new, overreaching interpretations of Section 111. Since

the Copyright Office, by its own regulations, cannot provide operators with legal advice on how to achieve compliance, cable systems fearful of the exponential monetary exposure and litigation costs will have to acquiesce to the higher royalty payments.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. If Cablevision is ultimately correct in urging that its construction of Section 111(d) of the Act is the one which accurately reflects and promotes Congress' intent, the matter should be remanded to the district court for appropriate disposition of the MPAA counterclaims.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5552

CABLEVISION SYSTEMS DEVELOPMENT COMPANY

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al.,
APPELLANTS

U.S. COPYRIGHT OFFICE AND ITS REGISTER

And Consolidated Case Nos. 86-5553,
86-5554, 86-5597, 86-5635, 86-5636 and 86-5637

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-01655, 83-02785 and 84-03097)

Argued October 15, 1987

Decided January 5, 1988

Stuart H. Newberger, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Dorothy Schrader*, General Counsel, United States Copyright Office, *Royce C. Lamberth* and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief for federal appellants/cross-appellees.

Richard M. Cooper, with whom *Edward Bennett Williams*, *Robert W. Hamilton*, *Paul Mogin*, *Arthur Scheiner* and *Dennis Lane* were on the brief for appellants/cross-appellees, Motion Picture Association of America, Inc., et al.

Jay E. Ricks, with whom *David J. Saylor*, *Gardner F. Gillespie*, *Steven J. Horvitz* and *Brenda L. Fox*, were on the brief for appellee, National Cable Television Association, Inc. *Michael S. Schooler* also entered an appearance for appellee, National Cable Television Association, Inc.

Mark J. Tauber and *Michael A. Schlanger*, with whom *Deborah C. Costlow* and *Nora E. Garrote* were on the brief for appellee cross-appellant, Cablevision Company.

Phillip R. Hochberg, for National Basketball Association and National Hockey League, *Ritchie T. Thomas* and *Judith Jurin Semo*, for National Collegiate Athletic Association, *David H. Lloyd*, *Robert Alan Garrett*, *Terri A. Southwick*, and *Edwin M. Durso*, for Major League Baseball, *Victor E. Ferrall, Jr.* and *John I. Stewart, Jr.* for National Association of Broadcasters, *Bernard Korman* and *I. Fred Koenigsberg*, for American Society of Composers, Authors and Publishers, *Charles T. Duncan* and *Michael Faber* for Broadcast Music, Inc., *Nicholas Arcomano* for SESAC, Inc., *Gene A. Bechtel* for Public Broadcasting Service, *James S. Gorelick* for National Public Radio, *John H. Midlen, Jr.* for Old-Time Gospel Hour, and *Douglas G. Thompson, Jr.* for Canadian Broadcasting Corp., were on the brief for amici curiae, National Basketball Association, et al.

Robert W. Coll also entered an appearance for amici curiae, National Hockey League.

Before: ROBINSON, RUTH B. GINSBURG and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (1982 & Supp. IV 1986), grants cable television systems a license to retransmit copyrighted broadcast [1] programming to their subscribers, *id.* § 111(c)(1), and requires in return that the systems deposit with the Copyright Office a fee equal to a "specified percentage[] of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters," *id.* § 111(d)(1)(B).[2] In a series of complaints consolidated for trial, a trade association representing the cable television industry and Cablevision, an individual cable company, sued several copyright owners seeking a declaration of the meaning of the above-quoted language. The copyright owners filed counterclaims against Cablevision for copyright infringement, alleging that Cablevision's interpretation of the statutory phrase led to an underpayment of the required fee and thus made

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[1] Throughout this opinion, a "broadcast" program is one originally propagated by traditional over-the-air television signals for receipt by antenna, and a "cable-originated" or "non-broadcast" program is one produced solely for cable systems and disseminated only through them. "Transmission" is a general term denoting any means of delivering programming. Thus, a broadcast program could be retransmitted over cable.

[2] In 1986, Congress amended 17 U.S.C. § 111(d) by eliminating old § 111(d)(1) and redesignating accordingly. Pub. L. No. 99-397, § 2(a). The subsection at issue here, new § 111(d)(1), appears as § 111(d)(2) in the district court's opinion.

the company an infringer. On the district court's order, the trade association joined the Copyright Office as a defendant.

On cross motions for summary judgment, the district court rejected the Copyright Office's interpretation of the statute—that gross receipts "include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals," 37 C.F.R. § 201.17(b)(1) (1987)—as inconsistent with congressional intent and endorsed instead the position of the trade association. *Cablevision Co. v. Motion Picture Ass'n of Am.*, 641 F. Supp. 1154, 1161 (D.D.C. 1986). The court ordered the Copyright Office to modify its regulation to accord with the court's perception of congressional intent. The district court then dismissed the counterclaims for infringement on grounds that there had been no violation of "the spirit of the law." *Id.* at 1163. The copyright owners, the Copyright Office, and Cablevision appeal, putting forward a wide variety of arguments for reversal or modification of the district court's order. We hold that the Copyright Office has the authority to issue regulations interpreting the statutory language at issue and that its interpretation was a reasonable one. We agree with the district court's rejection of Cablevision's reading of the statutory term "basic service," but hold that the district court erred in declining to defer to the Copyright Office's regulation as to what revenues make up "gross receipts." We also reverse and remand for further proceedings regarding the counterclaims. The basis for the district court's dismissal is unclear, and the record before us is insufficient to allow us to rule as a matter of law on whether infringement occurred.

I.

This case presents a dispute over the structure of a statutory fee that cable television operators must pay for

the right to retransmit broadcast television programming. Those who pay the fee, the cable systems, advocate a construction that the eventual recipients of the fee, the copyright owners, find objectionable. The dispute arose because, after governmental intervention designed to correct a market imperfection, the market evolved in unanticipated directions. The disagreement has its roots in two Supreme Court decisions, *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974), and *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968), that held retransmissions by cable television systems of broadcast programming, whether of local or distant origin, did not constitute "performances" under the copyright law and thus did not give rise to liability for infringement. The *Teleprompter* Court concluded that if the Copyright Act of 1909 was inadequate to govern the commercial relationships that had emerged in the interim, it was for Congress to create a substitute. 415 U.S. at 414.

Thus prompted, Congress, as part of its revision of the copyright laws, addressed in particular this problem of "secondary transmissions." When a cable system takes a broadcast signal ("primary transmission") and delivers it to the system's subscribers ("secondary transmission"), the system is earning money by selling to its customers the copyrighted material licensed only for the primary broadcast transmission. Under *Fortnightly* and *Teleprompter*, the copyright owner was unable to share directly in those revenues. Congress was of the view that the copyright holders should receive direct compensation for the use of their rights. But Congress also recognized that the transaction costs accompanying the usual scheme of private negotiation that controls the use of copyrighted materials could be prohibitively high. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5704. The operator of a small cable system in a rural area, for

instance, might find it more profitable to forgo rebroadcasting a wide variety of signals rather than to negotiate with various copyright owners in Atlanta, Chicago, and Los Angeles; cable operators, subscribers, and copyright holders would all be worse off under such circumstances than in a world where the retransmission rights could change hands at a lower cost. Congress saw that neither the situation as it existed after *Fortnightly* and *Teleprompter* nor a replication of classic copyright arrangements would be entirely satisfactory.

The response was a new regime, embodied in section 111 of the revised Act. Congress first abandoned the notion of individual negotiation in favor of a compulsory license. Under § 111(c) of the Act, a cable system may retransmit to its customers any primary transmission made by a broadcast station licensed by the Federal Communications Commission.[3] In exchange for this privilege, however, the cable systems are required to pay a fee, to be distributed to the copyright owners as surrogate for the royalties for which they might have negotiated under a pure market scheme.

In devising that fee, Congress drew a crucial distinction between local and distant broadcast signals. The House Judiciary Committee observed that "there was no evidence that the retransmission of 'local' broadcast signals . . . threatens the existing market for copyright program owners." H.R. REP. NO. 94-1476, *supra*, at 90. Because local[4] retransmission does not carry the signal

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[3] *I.e.*, the familiar network and local programming that can be received with an antenna. The words "station" and "channel" are synonymous for purposes of this opinion and refer to an entity that transmits by broadcast or cable a single regular schedule of programming. For example, a local affiliate of a network is a station or channel, as is a cable-originated entity such as ESPN that offers a single complete bill of fare.

[4] The technical definition of local, which appears at 17 U.S.C. § 111(f), is not at issue in this case. For conceptual

to households beyond those local advertisers would be willing to pay to reach, the advertising revenue base will be increased by any expansion of the scope of the dissemination due to the retransmission, and copyright owners will be able to negotiate with the broadcaster to receive appropriate compensation. By the same token, the retransmission of network signals, from whatever distance, causes no difficulty. Advertisers on national network television—such as CBS—expect to reach audiences nationwide and pay accordingly. Because national advertisers will pay to reach any incremental viewers, networks will be willing and able to pay copyright holders the full value placed on the receipt of the program by viewers (as measured by the willingness of advertisers to buy time during the program). *Id.* Distant non-network programming is altogether another matter. Local advertisers will not pay extra to reach viewers who cannot reasonably be expected to patronize their businesses, so the revenue base from which to compensate the owners understates the value of the use of the materials, and the copyright holders would, absent an adjustment mechanism, be undercompensated. *Id.*; *see also National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1079 (D.C. Cir. 1982). The Act therefore allows the copyright owners of *distant non-network programs* to receive a portion of the fees paid to the cable systems by subscribers. 17 U.S.C. § 111(d)(3)(A)

Congress' broad purpose was thus to approximate ideal market conditions more closely than would either the *Teleprompter* or individual negotiation models; the compulsory license would allow the retransmission of signals for which cable systems would not negotiate because of

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purposes, a signal is "local," as opposed to "distant," if the subscribers of a particular cable system can receive the broadcast signal with an antenna. *See, e.g., Teleprompter*, 415 U.S. at 401 & n.7.

high transaction costs, and the owners of copyrights for non-network programs carried on cable systems far from the original area of broadcast—who could not receive full value out of advertising revenues—would receive compensation out of the fees paid by the systems.

The disputed fee computation comprises two parts and is deceptively simple in principle. The cable system first calculates "the gross receipts from subscribers to the cable service during [the applicable] period for the basic service of providing secondary transmissions of primary broadcast transmitters." 17 U.S.C. § 111(d)(1)(B). By using one of three formulas, selected according to the amount of gross receipts, the system then determines what percentage of gross receipts is due as a fee.

For larger cable systems, the percentage of gross receipts owed depends upon the number of *distant signal equivalents* ("DSEs") carried by the system.[5] The DSE figure is calculated by assigning a value of 1.0 to each distant independent station carried and 0.25 to each distant network station or distant noncommercial educational station, and summing. *Id.* § 111(f). The lower value is assigned to distant network affiliates because the bulk of their programming is provided by the networks and, as described above, copyright owners of network broadcasts are presumed to be fully compensated out of revenues from advertisers seeking to reach the national market. The fee owed rises by a certain per-

[5] Congress was concerned about the potential impact of the fees on smaller systems, especially since many such systems must carry more distant signals to compensate for sparse local broadcasting, and therefore provided them special relief. *See* H.R. REP. No. 1476, *supra*, at 96-97; S. REP. No. 473, 94th Cong., 1st Sess. 81 (1975). Systems with semiannual gross receipts of $75,800 or less pay a flat fee of $28. Systems with semiannual gross receipts of more than $75,800 but less than $292,000 pay a fee based on set percentages of gross receipts without regard to DSEs. *See* 17 U.S.C. § 111(d)(1)(C), (D); 37 C.F.R. § 308.2(b).

centage of gross receipts—which percentage, established by regulation, declines as the number of DSEs rises—for each incremental DSE. *See id.* § 111(d)(1)(B); 37 C.F.R. § 308.2(a).[6] Thus, a large (gross receipts greater than $292,000) cable system that carried one distant signal equivalent would pay 0.893% of gross receipts, a comparable system with a DSE of 2.0 would pay 1.456%, and a similar system with a DSE of 5.0 would pay 2.847%. A system with a DSE of less than one, however, would also pay 0.893%. 37 C.F.R. § 308.2(a)(1); *see also* H.R. REP. No. 94-1476, *supra*, at 96. The Act does not require perfect correlation between the number of distant signals retransmitted and the fee paid, but it operates roughly to charge systems according to the number of distant signals they use. *See supra* note 5 (small systems pay regardless of signal use). Finally, the fees are distributed to the designated copyright owners by the Copyright Royalty Tribunal ("CRT"), a body created by the Copyright Act to administer certain of its provisions.[7]

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[6] The declining proportion of gross receipts added to the fee for each additional DSE is appropriate since, *ceteris paribus*, the revenues of a *large* system, *see supra* note 5, could be expected to rise with each new signal. The mechanism provides for a more uniform dollar-per-subscriber-per-signal fee.

[7] 17 U.S.C. § 801. The CRT performs two main tasks relevant here. The first is the quasi-judicial function of distributing among copyright owners the fees paid to the Copyright Office under section 111, thus completing the statutory substitute for market transactions. *Id.* § 801(b)(3); *see also id.* § 111(d)(3), (4). Second, the CRT has the quasi-legislative responsibility to adjust the fee rates to reflect inflation or cable system subscription rate changes in order to maintain the real per-subscriber royalty fee which existed at the date of enactment. *Id.* § 801(b)(2)(A). The CRT also has the power to adjust overall rates to maintain reasonableness in the light of FCC rule changes. 17 U.S.C. § 801(b)(2)(B), (C). The CRT has no responsibility or authority to define gross receipts or otherwise to determine the relative share of the total fund

The foregoing description of the operation of section 111 is common ground for the parties. The dispute centers on the definition of "gross receipts . . . for the basic service of providing secondary transmissions," the base amount from which the fee is calculated and on which depends the size of the fund the CRT distributes. Congress did not define "gross receipts" or "basic service" in the 1976 Copyright Act, but an examination of the reports on the legislation evokes a fairly sharp image of the model that Congress had in mind at the time of enactment. According to that picture, the cable subscriber had available from the system a single package for a flat fee containing a number of retransmitted broadcast signals and some channels produced just for cable—the "basic service" that every subscriber received—and beyond that, individually priced specialty channels available only on cable from which the subscriber to the basic service could pick and choose—"pay cable." *See, e.g.*, H.R. REP NO. 94-1476, *supra*, at 88.[8] In this paradigmatic case, the definition of gross receipts from basic service was simple; gross receipts were the flat fee for the initial package multiplied by the number of subscribers. It was clear from the outset that receipts for pay cable and other charges unrelated to programming, such as those for installation, were not to be a part of gross receipts, *see* H.R. REP. NO. 99-1476, *supra*, at 96, and that proposition is undisputed before us.

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to be contributed by individual cable systems. *See* 17 U.S.C. § 803(a).

[8] The legislative history does not make it absolutely clear whether Congress understood the term pay cable to encompass only individually priced non-broadcast stations—the usual content of the term, *see Home Box Office, Inc. v. FCC*, 567 F.2d 9, 18 & n.8 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)—or to include the possibility of a package of several cable-originated channels offered for one price. As the remainder of this opinion will indicate, we need not reach the question and therefore leave it unanswered.

Primarily because of technological constraints, the initial package consisted largely of the retransmission of local broadcast signals and of certain rather rudimentary cable-originated programming—mostly automated time, weather, and news services and access channels available to local citizens as an outlet for speech, *see* 47 C.F.R. § 76.254 (1976). As a rule, such cable-originated services were not greatly prized by subscribers and whether they were included in the gross receipts pool was a matter of negligible concern.

Evolution of the cable industry and its marketing practices rather quickly made the meaning of gross receipts problematic, however, as reality diverged from the model on which the Act was based. As improvements in terrestrial technology gave cable systems increased channel capacity, advanced satellite services allowed cable transmissions to be offered nationwide. These developments ushered in such familiar and popular cable-originated stations as ESPN and CNN and made possible the development of "superstations," stations broadcast in one location but carried nationwide by cable, such as WTBS from Atlanta and WGN from Chicago.[9] Because the initial package offered to subscribers might now contain, for one price, local broadcast programming, distant broadcast programming (*e.g.*, WTBS), and highly desirable cable-originated programming (*e.g.*, ESPN), the question arose whether cable companies could allocate part of the initial package's subscription price to cable-

[9] As advertisers recognize that the superstations reach national audiences, one would expect the charges for advertising time to rise, allowing copyright owners to negotiate appropriate royalty fees from superstations as they do from networks. The statutory scheme could thus become superfluous for perhaps the most important category of distant broadcast programming. *See Operators Rate WTBS, ESPN Most Valuable Basic Services*, Multichannel News, July 4, 1983, at 1 (listing superstation WTBS as one of the most lucrative cable properties other than pay cable).

originated programming and exclude that amount from gross receipts. Changes in the marketing of cable services added to the confusion. The practice of selling a single initial package plus individually priced pay cable stations gave way to tiering: the offering of several different packages, or tiers, of stations, with each tier separately priced.[10] And each tier might contain both broadcast and cable-originated stations. The question soon arose of whether entire tiers could be excluded from gross receipts as well as whether it was permissible to exclude revenues from non-broadcast channels within a "mixed" tier that contained both broadcast and non-broadcast channels. Because the congressional debates centered on a model of the cable industry that omitted such complexities, no obvious answers were available.

We thus arrive at the crux of this case—whether revenues from all tiers other than pay cable and from all channels within each included tier must be included in gross receipts. The cable companies argue that, since the statute was not meant to reimburse the copyright owners of *non-broadcast* programming, and since advertisers buy time on cable-originated stations that are carried nationwide such as CNN and ESPN just as they do on the broadcast networks, with the desire to address the entire audience actually reached, there can be no reason to include receipts for subscriptions to cable-originated channels in a fund designed to reimburse the owners of copyrights on distant *broadcast* programming. Therefore, the cable companies reason, revenues from non-broadcast channels or tiers that do not resemble the initial package envisioned by Congress should not be included in gross receipts.

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[10] For example, tier 1 could offer four local broadcast stations and an automated weather service plus ESPN and WTBS for $6, tier 2 could carry WGN and CNN for $3, and tier 3 could carry eight more cable-originated channels for $5.

The germ of a regulatory answer to these contentions appeared in 1978 in a revision of the Copyright Office's regulations implementing section 111. Those regulations emphasized that gross receipts included "the full amount of monthly (or other periodic) service fees," 43 Fed. Reg. 27,827, 27,832 (1978). The preamble explained that systems that furnished to subscribers "for a single monthly fee, a service that includes retransmission of radio and television signals and local origination (*such as time and weather and automated news services*)," *id.* at 27,828 (emphasis added), could not allocate a portion of the fee to the local origination services (and thereafter exclude that portion from gross receipts) because the Copyright Office could find "no statutory justification or basis for allocating" the fee. *Id.* The Office thus determined early on, albeit without considering the case of more valuable non-broadcast properties such as ESPN, that intra-tier allocation was impermissible.

In response to changes in the cable industry, and, most important for our purposes, to comments from cable system operators that a review of the definition of gross receipts was desirable, the Copyright Office undertook an exhaustive reevaluation of its regulations in 1981. 46 Fed. Reg. 30,649, 30,650 (1981). Among other items, it proposed to examine whether gross receipts from a particular tier could be prorated when that tier contained non-broadcast components and whether a system that offered tiered service should be required to include any, all, or part of revenues from tiers not received by all subscribers in gross receipts from basic service. *Id.* at 30,651.

In the public hearing, Robert W. Ross, Vice President for Legal Affairs and Government Relations of the National Cable Television Association ("NCTA"), a trade association for cable system operators, admitted that attempts to prorate revenues among channels offered on the same tier "would add an undue complication to the pro-

cess, and might well be a subject for substantial litigation and dispute. . . . [Attempting proration] is not the position that reflects the attitude of the Association. . . . I think you could create a regulatory monster . . . ." Hearings of July 28, 1981, Joint Appendix at 325-27. The resulting regulation issued some time later, in April of 1984. 49 Fed. Reg. 13,029 (1984). No doubt influenced in part by the NCTA's position, the regulation provides that "[g]ross receipts for the 'basic service of providing secondary transmissions of primary broadcast transmitters' include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals." 37 C.F.R. § 201.17(b)(1). In short, if a tier contains a broadcast signal, all subscription revenues from the tier are to be included in gross receipts.

This lawsuit cannot accurately be styled solely a challenge to that interpretation, for the first complaint was filed almost one year before the regulation took effect. Cablevision, a New York cable system operator, sought a declaratory judgment regarding the proper definition of gross receipts from basic service. Cablevision had since 1979, when it moved distant broadcast programming from the initial tier those channels occupied with local broadcast programming to an optional, higher tier, interpreted the term to include only those monies received for subscriptions to the first, or lowest, tier to which all customers were required to subscribe before electing higher tiers. Cablevision argued that its interpretation was correct because its definition of "basic service" comported with trade usage of the term and a consistent line of FCC and congressional use.[11]

The defendants to that declaratory action, the Motion Picture Association of America and eight of its member

[11] Cablevision later filed a second complaint on behalf of three of its other systems that engaged in the same reporting practices.

companies ("Copyright Owners") filed counterclaims charging Cablevision with copyright infringement under section 111 for retransmitting broadcasts without paying the proper statutory fee. *See* 17 U.S.C. § 111(c)(2). The district court bifurcated the case; the first phase was to deal with the proper definition of gross receipts, the second, to follow if it was determined that Cablevision had not complied with the law, with the question of what copyrights had been infringed and what remedies were due.

The NCTA entered the battle in September of 1983 by filing a complaint for declaratory judgment regarding the meaning of the Act against the same defendants. It was the NCTA's position that cable systems should be allowed to attribute a portion of the revenues received as subscribers' fees for each tier containing both broadcast and cable-originated programming to the latter programming and to exclude that amount from gross receipts. In effect, the NCTA was challenging the decision of the 1978 regulations not to allow allocation and abandoning —indeed reversing—its position in the 1981 hearings before the Copyright Office. The district court ordered the NCTA to join the Copyright Office and the Register of Copyrights as necessary parties and then consolidated the cases and ruled on motions for summary judgment.

The district court declined to accord deference to the Copyright Office's regulation, holding that the regulation's definition of gross receipts did "not have a reasonable basis in law and frustrate[d] the underlying congressional policy." 641 F. Supp. at 1160. The district judge concluded that it "seem[ed] unfair" to require a cable system to pay the section 111 royalty fee on nonbroadcast transmissions for which it had already paid merely because the channel was in the same tier with broadcast programming. *Id.* The court however rejected Cablevision's attempt to equate "basic service" with "first tier" as also inconsistent with Congress' purpose and as

inviting manipulation. It instead agreed with the NCTA that the statute requires revenues attributable to non-broadcast programming to be excluded from gross receipts and ordered the Copyright Office to devise a means of performing this allocation. *Id.* at 1162-63. Finally, the court dismissed the counterclaims, finding that Cablevision "did comply with the spirit of the law." *Id.* at 1163. On appeal, all parties but the NCTA attack the district court's definition of gross receipts, and the Copyright Owners seek reversal of the dismissal of their counterclaims.

II.

We agree with government counsel's statement at oral argument that, as applied to the cable industry as now constituted, section 111 is "not a model of clarity." The statute fails to define the basic terms at issue here, and the legislative history strongly indicates that Congress never considered the arguments now before us. The instant case thus would seem to be controlled by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in which the Supreme Court addressed the "bubble concept" for defining "stationary source" within the Clean Air Act Amendments of 1977 and concluded that an examination of the legislation and its history revealed that Congress had no specific intention regarding the matter. *Id.* at 851, 862. The Court held that, in the face of such legislative silence, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.[12] But before we examine the reason-

[12] We are urged to undertake a more searching review on the strength of language in *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987). Cablevision in particular argues that this case means that a court owes no deference to an agency whenever "a pure question of statutory construction," *id.* at 1221, is involved. The Supreme Court has recently confirmed, however, that the language in *Cardoza-Fonseca* does not alter the *Chevron* test—courts are to use the "traditional tools of statu-

ableness of the Copyright Office's interpretation, we must first deal with an anterior question: Does the promulgating agency, the Copyright Office, have authority to interpret the statute and are *its* interpretive regulations due judicial deference if reasonable?

Cablevision and the NCTA contend that the Copyright Office's interpretation is owed no deference because the Office has no authority to issue such a substantive regulation. The NCTA's position on this point, however, is paradoxical; it argues that "the Copyright Office lacks the legal authority and expertise to issue binding interpretations of the Copyright Act," yet at the same time asks us to direct that same Office to issue regulations (forms) to implement its general intra-tier allocation proposal. The awkwardness of the NCTA's position serves to emphasize that this statute is not self-executing. Given Congress' awareness of the rapid changes taking place in the cable industry, we cannot believe that Congress intended that there be no administrative overseer of this scheme. The statute's language is not to the contrary. Section 702 of title 17 of the United States Code authorizes the Register of Copyrights "to establish regulations . . . for the administration of the functions and duties made the responsibility of the Register under this title." More specifically, section 111(d)(1) of that title directs that cable systems deposit their compulsory license royalty fees with the Register of Copyrights, "in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal . . ., prescribe by regulation."

Cablevision and the NCTA resist the obvious import of these passages by contending that this rulemaking

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tory construction" to determine congressional intent, and to defer to the agency's permissible construction when the statute is "silent or ambiguous." *NLRB v. United Food & Commercial Workers Union, Local 23*, 56 U.S.L.W. 4037, 4040-41 (U.S. Dec. 15, 1987); *see also id.* at 4043 (Scalia, J., concurring).

power is limited to the ministerial task of designing forms, and they present authority asserted to stand for the proposition that the Copyright Office is unusual among government agencies in that its interpretations of the statutes it administers are due no judicial deference. Of course, designing forms to implement the NCTA's proposal has a substantial policy component. But, more to the point, we observe that this case is fundamentally one of first impression regarding section 111 and hold that the cases cited do not, for reasons we will discuss, establish the general principle that the Copyright Office's interpretation of that statute can be ignored. Our holding on deference due the Office does not extend beyond the bounds of its interpretation of section 111, but we do believe the Office's construction of at least that section is due deference.

We have emphasized that the compulsory licensing scheme was a break from the traditional copyright regime of individual contracts enforced in individual lawsuits. If we agreed that the Copyright Office had no power to interpret the statute, every dispute over the meaning of the statute could give rise to an infringement action [13] where, as this case suggests, enormous damage claims are commonplace.[14] If, on the other hand, reasonable interpretations of the statute by the Copyright Office are due judicial deference, a copyright holder's incentive to bring infringement actions that are based on interpretations other than those of the Copyright Office would be reduced. Since Congress consciously rejected traditional, contract-based implementation as unworkable, a holding that forced resolution of every dispute in an infringement or declaratory judgment action would be unfaithful to this

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[13] No party argues that the CRT or the FCC, or anyone other than the Copyright Office or the judiciary, has authority to interpret the language in question.

[14] Cablevision suggests it could be subject to a $3 billion judgment.

policy choice and antithetical to Congress' central concern of providing a low cost transfer of copyrighted materials.

We are also unpersuaded by the suggestion that no deference is due the Office because it lacks expertise in this field. The Copyright Office certainly has greater expertise in such matters than do the federal courts; and while watching over the cable industry may have been a novel brief for the Copyright Office when the new Act was passed, that agency has had time to accumulate experience. But, in any event, *Chevron*'s rationale for deference is based on more than agency expertise.

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. . . . [I]t is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865-66. Like the Court in *Chevron*, we are faced with several interpretations of ambiguous language which really involve competing policies among which Congress did not explicitly choose. We see no reason to deny the Copyright Office's legitimacy in selecting, as the EPA did in *Chevron*, among those choices so long as the interpretation selected is reasonable.

The Supreme Court implicitly considered whether deference is due the Copyright Office's construction of the Copyright Act in *DeSylva v. Ballentine*, 351 U.S. 570 (1956). Resolving a dispute between an author's widow and his illegitimate child, the Court took note of Copyright Office regulations, recently rescinded though apparently still followed in practice, that ostensibly governed the issue. The Court stated that it "would ordi-

narily give weight to the interpretation of an ambiguous statute by the agency charged with its administration," *id.* at 577-78, but declined to rely on the interpretation because the fact that the practice was "more the result of a decision that there is substantial doubt over the question, rather than the result of a confident interpretation of the statute" deprived the practice "of any force as an interpretation of the statute," *id.* The Supreme Court has thus indicated that it would defer to the Copyright Office when the latter actually interpreted the statute, undermining the notion that the Office is never owed deference.[15]

To be sure, the Copyright Office in this case may have come close to the point of excessive diffidence identified in *DeSylva*. In its statement promulgating the 1984 regulations, the Office "welcome[d] the guidance of the courts on 'tiering,'" but concluded it could not justify further delay in issuing regulations in light of requests from "the major interests affected by the compulsory license" that the agency take a position. 49 Fed. Reg. 13,029, 13,031 (1984). The Office also stated it could not "provide the flexibility requested by cable systems absent guidance from the Congress or the courts." *Id.* at 13,035. On balance, however, we conclude that the Office did see itself as having the authority to issue regulations and did make "a confident interpretation of the statute." *DeSylva*, 351 U.S. at 577. The Office stated that "[w]ith respect to administration of the Copyright Act in general and the compulsory licenses in particular, the Copyright Office must and does, however, interpret the Act." 49 Fed. Reg. 13,029, 13,031 (1984). After weighing the potential administrative costs of intra-tier allocation, it concluded that "the Copyright *Act* does not permit any proration or other allocations of either DSE's or gross re-

[15] The *DeSylva* Court may also have been unwilling to attribute to Congress an intent to delegate to the Copyright Office authority over a matter such as the descent of property that is traditionally entrusted to the states.

ceipts," *id.* at 13,035 (emphasis added)—*not* that the Office did not have the power to order the allocation. The Office thus did interpret the statute with the meaning of *DeSylva*.

Cablevision and the NCTA also rely on *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975). The Second Circuit there refused to give weight to a definition of "posthumous" appearing on a Copyright Office form, stating flatly that "the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight." *Id.* at 946-47 (footnotes omitted).[16] But the court held the interpretation put forward by the Office was inconsistent with legislative intent, so its statement on the deference due the Office would seem to be a dictum. In any event, the Second Circuit was not considering section 111, and we cannot agree with Cablevision and the NCTA that the court's proposition, even if generally sound, should be extended to cover that section. We think Congress saw a need for continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role. Its interpretations are therefore due the same deference given those of any other agency. We thus turn to the reasonableness of the construction at issue.

III.

The regulation applies the language of 17 U.S.C. § 111 (d)(1)(B): "the gross receipts from subscribers . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." We find it telling that the interpretations of that language offered by Cablevision and the NCTA as alternatives to the Copyright Office's regulation violate the canon of construction

[16] The *Bartok* court cites *DeSylva*. As our discussion of the latter case indicates, we do not believe it stands for this proposition.

that effect should be given to every word of the statute so that no part is rendered "inoperative or superfluous." *Norfolk & W. Ry. v. United States*, 768 F.2d 373, 379 (D.C. Cir. 1985), *cert. denied*, 107 S. Ct. 270 (1986). The NCTA's interpretation, adopted by the district court, would allow cable companies to assign monetary values to non-broadcast programming that is combined with broadcast programming in a mixed tier and to exclude those amounts from gross receipts. This approach reads "basic service" out of the statute; under this view, the language could as easily be "gross receipts from subscribers . . . for secondary transmissions of primary broadcast transmitters." By emphasizing only the delivery of discrete stations, this reading ignores the clear implication of the phrase "basic service" that cable services are typically provided in packages.

Cablevision, conversely, contends that "basic service" is a well defined term of art, meaning the first or lowest tier. But a necessary consequence of this interpretation is that all language that follows that term is superfluous. Indeed, since Cablevision contends basic service can contain anything the cable system chooses, and not necessarily just—or even any—broadcast retransmissions, *see infra* p. 29, the phrase "of providing secondary transmissions of primary broadcast transmitters," which would seem to serve the purpose in the statute of explaining "basic service." could actually *contradict* "basic service." The Copyright Office's regulation is thus the interpretation before us that best accounts for the statutory language.

The regulation also evinces a full understanding of the structure and purpose that underlie that language. In holding the regulation to be inconsistent with the will of Congress and adopting the interpretation espoused by the NCTA, the district court in our view misunderstood a fundamental mechanism of the statute. The court correctly observed that liability under the compulsory license

was to be limited to the retransmission of distant non-network programming, 641 F. Supp. at 1161; *see* H.R. REP. NO. 94-1476, *supra*, at 90, but failed to appreciate how the distant signal equivalents satisfy that intention. Because the DSE value—and hence the percentage of the fixed gross receipts base due as a fee—rises with each distant broadcast channel retransmitted, the cable system pays only for distant non-network[17] programming actually broadcast.

That Congress intended the DSEs to correlate the number of distant signals carried and fees paid can be further established by examining the divergences of the content of the revenue base and the programs eligible for reimbursement from the CRT. Congress *never* contemplated a precise congruence of the royalties paid and the amount of distant non-network programming actually carried. Instead, Congress picked a *convenient* revenue base and used the DSEs to discount it in a reasonable manner. Attempting to fine tune the gross receipts base to include only revenues from items reimbursable by the CRT is a plausible approach *a priori*, but it ignores Congress' actual decision and would ultimately render the DSE mechanism superfluous. Congress' clear understanding that gross receipts were to include revenues from subscription fees paid in part for the retransmission of local broadcasts (that much is apparent from the statutory language alone) is, since such local broadcasts are programming not eligible to draw from the fund administered by the CRT, a strong indication of its approach.[18]

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[17] Recall that a DSE of 0.25 is assigned to the retransmission of a distant network affiliate's signal, to approximate the proportion of non-network programming carried by such a station.

[18] The same is true of network programming on distant network affiliates. *Gross receipts* are not reduced to account for the payment copyright owners already receive for network programming, *DSEs* are. *See supra* text accompanying note 6.

If an allocation between broadcast and non-broadcast programming revenues in each tier were required by the statutory scheme, one would wonder why Congress did not call for a further allocation, to remove local broadcast revenues from gross receipts, and do away with the DSE system altogether. The answer, it seems to us, must be that DSE calculations were considered more practical and were therefore adopted in lieu of attempts at such allocation. All cable systems, moreover, pay a section 111 fee regardless of whether they carry any distant signals. *See supra* note 5. A payment scheme that reflected usage exactly would not impose such a requirement. Finally, it should be noted that the Act was an attempt to simulate the market in the face of the market's inability to provide precise fits between retransmissions and royalty fees, and so the Act could not itself aspire to too much precision.

In short, the reasonableness of the regulatory requirement that all revenues from a tier containing one retransmitted broadcast signal be included in gross receipts cannot be attacked for its failure to allow cable systems to attribute a value to nonbroadcast programs and to subtract that value from gross receipts.[19] We find no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions—indeed, as we have shown, in many cases the relationship is skewed considerably. Congress instead chose an easily calculable revenue base and used the DSEs to approximate the value received by the cable companies. The Copyright Office has simply continued that practice.

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[19] The regulation's stance on attribution is also due deference because of its relative contemporaneity with the enactment of the statute and its consistency. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965). It has its roots in the 1978 regulation prohibiting attribution. *See* 43 Fed. Reg. 27,827, 27,828, 27,832 (1978).

Comparison of the Copyright Office's regulation with the position now espoused by the NCTA suggests a further reason deference is due the regulation. The NCTA's interpretation, endorsed by the district court, would create "a hornet's nest of problems." [20] If five channels are sold as a package for $5, and none is priced separately for individual sale, one can conclude nothing more about the revenue that each generates individually than that it does not exceed $5.[21] The artificiality of contending that each is worth $1 is obvious from the example of a tier containing ESPN and four weather channels. Nor do viewer measurement techniques such as the Nielsen ratings provide a solution. Methodological wrangles and monitoring expenses far in excess of those required under the Copyright Office's regulation are easily foreseeable and would thwart the congressional goal of minimizing transaction costs.

The Copyright Office's interpretation avoids these obvious pitfalls, and that practicality alone provides substantial support for the reasonableness of its interpretation. When Congress delegates a function to an agency, we believe that an important element of congressional purpose is that the function be carried out sensibly and efficiently. Congress recognizes that it can only legislate,

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[20] The phrase is that of Robert W. Ross, testifying on behalf of the NCTA in hearings held by the Copyright Office on July 28, 1981, regarding attempting to allocate revenues to particular items sold in a single tier for one price. Joint Appendix at 326; *see supra* p. 13. It is interesting that the regulation promulgated after the district court adopted the NCTA's approach simply directs cable systems to attribute any amount they see fit to cable-originated programming. It asks only that they maintain records of the amounts thus deducted from gross receipts. *See* 51 Fed. Reg. 30,214 (1986); *id.* 45,110. No obvious method of attribution suggests itself.

[21] We assume, perhaps unrealistically, that no television station would have a negative value for a large number of consumers.

not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent. In *Drummond Coal Co. v. Hodel*, 796 F.2d 503, 507 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987), for instance, this court agreed that the Secretary of the Interior's definition of "coal produced" was reasonable, noting that the Secretary adopted the regulation out of concern for the vexing complications and expense that accompanied competing approaches and for the need for a uniform national standard. Similarly, including all revenues from any separately priced tier that contains one or more broadcast stations is a convenient, indeed perhaps the only reasonable, way of computing gross receipts that ensures a revenue base large enough to perform the function Congress intended—reimbursing copyright owners.

The reasonableness of the regulation is further bolstered by the ability it provides cable systems to control their own destiny. *See* 49 Fed. Reg. 13,029, 13,035 (1984) (Copyright Office's discussion of final regulation); *see also Drummond*, 796 F.2d at 507 n.9 (coal companies can act to limit impact of interpretation). A company can segregate all its secondary transmissions into a single tier and thus avoid including in gross receipts any revenues from cable-originated programming. Although the Copyright Office has no authority to regulate the marketing practices of cable companies, the companies could on their own forgo those marketing advantages that now lead them to pay higher than necessary fees.

In its separate challenge to the reasonableness of the regulation, Cablevision puts forth an alternative that at least can be said not to present administrative complexity. Cablevision concedes that the gross receipts base was not necessarily intended to include only broadcast signals, and rather was selected to provide a clear, uniform, and constant base for the calculation of royalty

fees, but asserts that the regulation is unfaithful to the Copyright Act by failing to equate "basic service" with the first tier of service to which all customers must subscribe. Cablevision argues that basic service was at the time of passage of the Act a trade term with the meaning Cablevision suggests and that the language was consistently used in earlier bills in the same manner.

Because Congress never considered the issue of "mixed tiering" this view is not without surface plausibility. The legislative history shows that Congress contemplated only one "tier" containing a mixture of broadcast and cable-originated stations. All higher "tiers" in this model contained only cable-originated stations for a separate fee, and these pay cable services were excluded from gross receipts. *See* H.R. REP. No. 94-1476, *supra*, at 96. Thus the tier from which gross receipts were to be calculated was at the same time all tiers (the only one) containing a broadcast signal—the Copyright Office's view—and the first tier alone—Cablevision's position.

As support for its construction, Cablevision points first to numerous affidavits of cable industry executives stating that basic service was an accepted trade term in the early 1970's, that it referred to the lowest tier of service, and that it was used interchangeably with "minimum level of service," "initial package," and "regular subscriber service." Cablevision contends the Congress must be presumed to have adopted this trade meaning. Our difficulty with this argument is that one can concede each step and not reach Cablevision's conclusion. Congress may have envisioned basic service as the first tier or the initial package when debating the Act, but it also viewed this level of service as the *only* level—other than tiers of pay cable that were to be excluded from gross receipts. The truth, it seems to us, is that Congress *never considered* the situation of multiple tiers containing broadcasting materials, and use of an industry definition from

a period when the practice under consideration was not widespread in the industry is singularly unenlightening.[22]

Cablevision nevertheless attempts to link its definition of basic service to the early concept of "adequate television service" that appeared in an unenacted Senate bill. *See* S. 644, 92d Cong., 1st Sess. (1971). That bill would have provided cable systems a compulsory license to retransmit local signals and any distant signals that would be a necessary complement to local broadcasting in providing "adequate television service"—service that would provide the system's customers access to a prescribed minimum range of stations—as defined by the Act. *See id.* § 111(c)(3). In return, cable systems were to pay a fee based on a percentage of gross receipts after reporting the "gross amounts paid to the cable system by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters." *Id.* § 111(d)(2). Cablevision argues that, since the language at issue in this case appeared initially in a bill relating to minimum or adequate service, basic service must be equivalent to "adequate" or "first tier" service.

Identity of language in an unenacted bill addressing adequate television service with language in an Act passed years later to deal with a transaction cost problem in the copyright law is not, by itself, particularly significant. Putting to one side the weight properly to be accorded an unenacted bill, we observe that words can take on vastly different meanings in different contexts. *See, e.g., Director v. Black Diamond Coal Mining Co.*,

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[22] A homely metaphor illustrates the tension between Cablevision's view and Congress' intent. Imagine a fee to be paid on the gross revenue from the sale of dressers, enacted at a time when dressers were available only as single pieces of furniture. With the advent of modular furniture, is it more in keeping with the statute's spirit to base the fee on revenues from the sale of bottom drawers only, which every customer must buy, or on the sale of all dresser drawers?

598 F.2d 945, 951 (5th Cir. 1979) (most words have multiple meanings, depending on context; absent evidence Congress intended to create a term of art, a word's meaning in one statute does not necessarily indicate its meaning in another). It is furthermore unclear whether the language of S. 644 does what Cablevision would have it do. The provision actually directing payment of a fee refers not to the "gross amounts paid . . . for the basic service" that the company is required to report, but to "the gross receipts from subscribers," presumably a much broader concept, even in Cablevision's view. *Id.* at § 111 (d)(2)(B).

The most troublesome aspect of this argument, however, is the explicit equation of basic service with adequate service. Cablevision has argued to us that the first tier—basic service in its parlance—may contain anything the cable system chooses. Its concept of basic service is therefore simply unrelated to adequate service, which presumably involves a specific content. And we are bemused by Cablevision's slightly misleading attempts to suggest that the FCC's "must-carry" rules, which require a cable system to provide certain services, assure a minimum content on the first tier. This court has twice struck down particular FCC must-carry rules as incompatible with the First Amendment. *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); *Century Communications Corp. v. FCC*, No. 86-1683 (D.C. Cir. Dec. 11, 1987).

Even where two equally tenable interpretations of a statute are put forward, one by the agency charged with administering the Act—as we have held the Copyright Office to be—and the other by a private party, we will favor the former. *See Udall v. Tallman*, 380 U.S. 1, 4 (1965). But on examination we find Cablevision's position untenable, since it could lead to the absurdity of only a minuscle portion of revenues, at the option of a cable

company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective.[23]

For the foregoing reasons, we conclude that the Copyright Office's regulation is reasonable as applied to calculations involving any tier viewed in isolation, the primary element of dispute in this case. If we rested on this conclusion, however, we would omit discussion of a matter heavily debated in the briefs and at oral argument and relied on substantially by the district court. In the proceeding below, the district court allowed counsel for the NCTA to request from Dorothy Schrader, General Counsel of the Copyright Office, responses to certain hypothetical questions regarding the Office's interpretation of its regulation. Whether or not that procedure was appropriate, once it was employed—once the General Counsel's letter of reply had put this ancillary dispute in issue—we understand why the district court acted on the questions the letter raised.

Nevertheless, and despite the government's failure to argue the point explicitly, we believe that the issues raised in Schrader's June, 1986 letter are unripe for judicial review. But because the issue has been hotly litigated both before us and below, and, more importantly, because our conclusion regarding unripeness stems as much from the confusion created by the letter as from any intrinsic unsuitability of the issues for disposition, we find it necessary in explaining our conclusion to discuss in some detail the 1986 letter and the debate surrounding it.

The letter deals with marketing practices we will style "discounts" and "tie-ins." The following hypotheticals are addressed: A cable system offers tier A, containing

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[23] We intimate no view as to whether the operation of the must-carry rules at an earlier time served to make Cablevision's behavior more or less willful. That issue is for the district court on remand. *See infra* Section IV.

all broadcast signals, for $10, tier B, containing two non-broadcast and two broadcast signals, for $1; and tier C, containing a pay cable station, for $9. General Counsel Schrader considers both a discount, offering all three tiers for $22, and a tie-in, under which the subscriber could receive tier A for $10 only after subscribing to tier C for $9. Schrader's opinion specifically requires the entire $22 discount price to be included in gross receipts, just as the $19 under the tie-in must be. She explained:

> Whenever the two types of service are offered for a single price or, if on separate tiers, whenever it is necessary to subscribe to one tier in order to receive another, the two services are in reality being offered as a single package of service; if secondary transmissions are included in the package, gross receipts from both tiers or the combined package must be reported and used in calculating copyright royalties.

Joint Appendix at 491 (emphasis omitted).

The NCTA argues, and the district court agreed, *see* 641 F. Supp. at 1160, that this language, if followed literally, would violate Congress' intent. They both read the letter to suggest that in precisely the paradigm case envisioned by Congress—in which the subscriber must purchase a basic package of retransmitted stations before going on to buy pay cable—receipts from pay cable must, contrary to Congress' specific intent, be included in gross receipts because "it is necessary to subscribe to one tier in order to receive" pay cable. We have some reason to believe, however, that the General Counsel was addressing a slightly different problem and merely expressed herself incompletely. Another, earlier letter from the General Counsel that appears in the record, Joint Appendix at 488, was written in August of 1985 and avoids the problem the 1986 letter seemingly creates.

The 1985 letter and the parties' presentations suggest the following analysis. Whenever a tier, call it Y, can be purchased only after another tier, X, has been purchased, there is a danger that the price associated with Y is merely notional. Thus, if Y contained broadcast signals that would be valued by consumers at $20, a cable operator bent on downward manipulation of receipts from the sale of Y could construct an X tier of automated services worth $1, make Y available only to subscribers to X, charge $19 for X and $2 for Y and, absent a requirement that the two amounts be lumped together, understate gross receipts for Y by $18 per subscriber. This technique will not work in reverse, however. Subscribers forced to buy through tier Y to be allowed to pay $19 for tier X will simply stop after buying Y, leaving the cable operator to absorb a loss or to raise the price to reflect value accurately. Generally, if a subscriber can buy a given tier without purchasing any others, its nominal price will be at least as great as its value; if the subscriber must purchase another tier to receive the one in question, the latter's price may be understated.

The language of the General Counsel's 1986 letter therefore would appear, as the district court discerned, to be too sweeping. Indeed, counsel for the Copyright Owners, a group whose interests would certainly be served by a strict adherence to the literal language of Schrader's letter, conceded it was "overbroad." The letter suggests that the two cases just described should be treated the same—revenues from both tiers should go into gross receipts regardless of whether X or Y must be purchased first—when there is a strong argument only the first should be so treated. The letter does analyze the tie-in case as we tentatively do, for in that hypothetical the broadcast signals in A can be bought only after purchasing C, so the price for A may be no more than nominal and there is a risk that gross receipts will be understated. The treatment of the discount seems

incorrect, though, for as we understand the hypothetical it would be possible to buy all the broadcast signals, A and B, alone for $14. That $14 price is therefore an accurate reflection of the value placed on the package and could be used in calculating gross receipts from retransmission from the $22 discount fee.

The Government's Reply Brief, moreover, adopts the analysis of the 1985 letter and seems to back delicately away from the inconsistencies in the 1986 letter. But at oral argument, counsel for the Government was unwilling to make any firm statement regarding the Copyright Office's position on this issue. We cannot, in light of this rather bewildering array of conflicting positions, affirm the reasonableness of this facet of the agency's interpretation of the statute. We nevertheless are quite unprepared to reject either the regulation or the interpretation in Schrader's 1986 letter on this basis. First, there is no showing as to the Copyright Office's actual practice in these cases. Requirements that subscribers "buy through" initial tiers of broadcast programming before receiving pay cable stations such as HBO are apparently widespread; it would be imprudent to invalidate an interpretation of a regulation on the subject, without more information, on the strength of one letter from the General Counsel replying to a hypothetical question.

Further, the rulemaking from which this regulation sprang never addressed tie-ins or discounting; it focused on the treatment of individual tiers. 49 Fed. Reg. 13,029 (1984). And the lawsuits now before us are focused on the first tier/basic service equivalence and the permissibility of allocating values within a tier. The tie-in and discount issues are a litigating afterthought, and we are uncertain from the record as to the Copyright Office's authoritative interpretation. It is often necessary to review agency action in a rather theoretical setting, but a court must have some sort of record upon which to base its review. There has been here no showing of an in-

terpretation to which the Office firmly adheres. The Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), observed that the purpose of the ripeness doctrine in the context of reviewing administrative action is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. If this dispute is not abstract, it is certainly not yet well defined enough for judicial review. The Copyright Office, will, we hope, clarify its position regarding tie-ins, perhaps in a rulemaking. Any party injured by the Office's new application of the regulation could, of course, seek relief from that concrete injury. *See Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979).

IV.

The district court ordered that the first phase of the trial consider "[w]hether plaintiff complied with the statutory prerequisite conditions for obtaining a compulsory license," and that a further hearing would be had, if it were determined that Cablevision was not entitled to a compulsory license, regarding "which copyrights of defendants have been infringed and the remedies therefor." In its opinion ending the first phase, the court dismissed the Copyright Owners' counterclaims. It noted that Cablevision had paid the fees indicated by its method of calculating gross receipts and had posted bonds to cover the difference between its payments and the amount required by the Copyright Office's regulation.[24] The court concluded Cablevision had complied "with the spirit of the law." 641 F. Supp. at 1163. The Copyright

[24] Cablevision had used its accounting convention since 1979 but posted bonds only for the periods after the 1984 issue of the regulation.

Owners point to the bifurcation order and claim this disposition was premature.

Section 111(c)(2) makes a cable system liable for infringement when, without paying the required royalty fee, it engages in the "willful or repeated secondary transmission" of primary transmissions. We recognize that the district court might have intended to conclude as a matter of law at the end of the first phase that Cablevision's conduct was neither willful nor repeated within the meaning of the Act.[25] The court did not couch its ruling in the statutory language, however, and while it might have thought "willful or repeated" equivalent to a disregard for the "spirit of the law," it did not clearly explain its reasoning. Nor did the court address how, if at all, Cablevision's conduct is to be judged in light of regulatory changes. Because we are unsure of the basis for the district court's dismissal and are unwilling to consider the issue of liability for infringement without the benefit of its full reasoning, and because it is also unclear whether the court's opinion directed Cablevision to pay back royalties for the entire period not excepted by the statute of limitations or only for the period after promulgation of the regulation—the period covered by the bonds the district court mentioned—we reverse the dismissal and remand for further proceedings on the counterclaim consistent with this opinion. The action is

Reversed in part and reversed and remanded in part.

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[25] "The words 'willful or repeated' are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts . . . . The Committee does not intend . . . that a good faith error by the cable system in computing the amount due would subject it to full liability as an infringer." H.R. REP. No. 94-1476, *supra*, at 93.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABLEVISION COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 83-1655
	)	
MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al.	)	
	)	
Defendants.	)	

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 83-2785
	)	
COLUMBIA PICTURES INDUSTRIES, INC., et al.	)	
	)	
Defendants.	)	

CABLEVISION COMPANY	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 84-3097
MOTION PICTURE ASSOCIATION, OF AMERICA, INC., et al.,	)	
	)	
Defendants.	)	

OPINION

These matters are before the Court on cross-motions for summary judgment, the respective opposition and reply briefs to the motions, a hearing on the motions, and the entire record herein.

I. Background

This civil action consists of three separately filed complaints which seek a judicial interpretation of a phrase contained in Section 111(d) of the Copyright Act of 1976, Pub.L. No. 94-553, 90 Stat. 2541 (1978) (codified at 17 U.S.C. §§ 101 *et seq.*) Plaintiff Cablevision Company ("Cablevision") filed two of those complaints, Civil Action Nos. 83-1655 and 84-3097. Cablevision provides cable television services to subscribers residing in Nassau, Westchester, and Suffolk Counties, New York, and in Bayonne and Bergen Counties, New Jersey. Plaintiff National Cable Television Association, Inc. ("NCTA") filed the third complaint, Civil Action No. 83-2785. NCTA is a trade association whose members include owners and operators of cable television systems in the United States. Cablevision, a member of NCTA, is also a plaintiff-intervenor in the *NCTA* action. *See* March 20, 1984, Order granting Cablevision's Motion to Intervene.

The defendants are the same in all three cases. They include eight copyright owners, co-owners or exclusive licensees of public performance, distribution and rights to the motion pictures which are the subject of this dispute and a trade association which represents the interests of these copyright owners. These copyright owners are Columbia Pictures Industries, Inc., Embassy Communications, MGM/UA Entertainment Co., Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Universal City Studios, Inc., Warner Bros. Inc., and the Motion Picture Association of America ("Copyright Owner Defendants"). The U.S. Copyright Office and its Register ("Copyright Office Defendants") were

joined as necessary party defendants in a separate count of an amended complaint pursuant to an order of this Court. *See* July 17, 1984, Order and Amended Complaint filed August 20, 1984. The Copyright Office is an office of the Library of Congress in Washington, D.C., which has certain responsibilities with respect to the Copyright Act of 1976 pursuant to that Act. The Register of Copyrights is the officer in charge of the Copyright Office.

Plaintiffs' complaints seek a declaratory judgment as to the proper interpretation of Section 111(d) of the Copyright Act of 1976, concerning the amount of gross receipts included in calculating the payment of copyright royalty fees by cable television systems for the basic service of providing secondary transmissions of primary broadcast transmitters. Both plaintiffs claim that the defendants interpret improperly section 111(d) so as to require cable operators to overpay substantially their copyright royalty fees and thereby unjustly enrich defendants. Moreover, Cablevision requests an order restraining Copyright Owner Defendants from instituting any further action against it for copyright infringement and such other relief as may be appropriate.

The defendants disagree with plaintiffs' reading of section 111(d). They argue instead that the plaintiffs' interpretation of the statute results in an underpayment of royalties. Defendant Copyright Owners filed a counterclaim for copyright infringement, statutory damages, injunctive relief, costs, and attorneys fees.

Before the Court discusses more fully the positions of the parties in this dispute, a short overview of section 111(d) and the development of the cable industry is in order.

A. The Copyright Revision Act of 1976

The Copyright Revision Act of 1976, 17 U.S.C. §§ 101 *et seq.*, established a compulsory copyright license for the

retransmission of television broadcast signals by cable systems. The Act was the culmination of congressional efforts to respond to the Supreme Court's decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), which held that the distribution of television broadcasts was not a "performance" so as to be protected by the Copyright Act of 1909. Consequently, the cable operators were not required to make royalty payments to the copyright owners. The Court stated in *Teleprompter* that "any ultimate resolution of the many sensitive and important problems in this field . . . must be left to Congress." 415 U.S. at 414.

Congressional efforts to safeguard the interest of the creators of copyright material being distributed on cable systems, while still allowing for the fullest development of the public's right of access to information through cable technology, began in 1964 and was followed quickly by the introduction of bills in 1965, 1966, 1967, 1969, 1971, 1973, and 1975, leading to the passage of the revised Copyright Act of 1976. *See The Cable Television Provisions of the Revised Copyright Act*, 27 Cath.U.L.Rev. 263, 279 n.64 (1978). Congress realized that it would be impractical, if not impossible, for each and every cable operator to negotiate directly with every copyright owner and embarked upon a new approach.

This new approach required cable operators to obtain a compulsory license in order to retransmit television programs. Copyright owners of motion pictures and/or other works that are embodied in the retransmitted signals are compelled to license these works to cable systems in return for which they are compensated through the payment of semi-annual fees by individual cable systems. These semi-annual royalty fees are computed in accordance with a statutory formula based upon gross receipts from a basic statutory service.

The royalty schedule formula was the result of last-minute negotiations between the copyright owners and the cable television industry and, with some modifications, is found in section 111(d)(2)(B) which provides for the fee to be

> computed on the basis of specific percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmission of primary broadcast transmitters. . . .

17 U.S.C. 111(d)(2)(B). The royalty fees are then distributed to those copyright owners whose works were the subject of secondary transmissions of broadcast signals. The Copyright Tribunal ("Tribunal"), an independent agency of the legislative branch, determines the formulae for dividing the fees among the copyright owners. The Tribunal is also authorized to ". . . adopt regulations . . . governing its procedures and methods of operation. . . ." 17 U.S.C. § 803.

Semi-annual statements of account which list the broadcast signals carried by the cable system operators must also be filed with the semi-annual royalty payments. Cable systems with semi-annual gross receipts below $146,000 pay a flat royalty fee ($28) regardless of the number of distant signals carried, and are known as "Form 1" systems. 17 U.S.C. § 111(d)(2)(C); 37 C.F.R. § 308.2(b)(1) (1985). Cable systems with semi-annual gross receipts of $146,000 to $292,000, commonly known as "Form 2" systems, pay a royalty fee based on a set percentage of gross receipts regardless of the number of distant signals. 17 U.S.C. § 111(d)(2)(D); 37 C.F.R. § 308.2(b)(2) (1985).

Major cable systems with semi-annual gross receipts in excess of $292,000, known as "Form 3" systems, pay royalty fees based on a percentage of gross receipts, but the percentage varies with the number and nature of the broadcast signals retransmitted. The licensing fee of the

major cable operators is based upon a percentage of gross receipts derived from basic subscriber charges multiplied by the number of distant signal equivalents ("DSE") carried. A DSE is a numerical value assigned to the secondary transmission of a non-network television program beyond the local service area of the primary transmitter by a cable system. 17 U.S.C § 111(f). Different DSE values are assigned to three types of stations (independent, network affiliated, and noncommercial educational) that can be retransmitted as distant signals.[1] *Id. See* Copyright Owner Defendants' Motion for Summary Judgment on Phase One Issue at 10-12, filed March 2, 1984, for a detailed explanation of Form 3 System royalty fee calculations.

Congress defined the terms "secondary transmissions" and "primary transmissions" used in section 111(d)(2)(B) of the Act.[2] It failed, however, to define specifically the terms "gross receipts" or "basic service," the meaning upon which this controversy centers. The Copyright Tribunal, consistent with its mandate and over six months after NCTA filed its complaint, adopted rules of procedure and prepared forms for the use of cable operators to fa-

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[1] A greater distant signal equivalent ("DSE") value is "assigned independent television stations since they almost exclusively carry nonnetwork programming; a lesser value is assigned to network affiliates since they carry only a limited amount of nonnetwork programming." National Cable TV v. Copyright Royalty Tribunal, 689 F.2d 1077, 1080 n.17 (D.C. Cir. 1982).

[2] A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

> A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico. . . .

17 U.S.C. § 111(f).

cilitate the filing of periodic statements of account and defined specifically "gross receipts." According to the Tribunal,

> [g]ross receipts for the "basic service of providing secondary transmissions of primary broadcast transmitters" include the full amount of monthly (or other periodic) service fees for any and all services or tiers of service which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees. All such gross receipts shall be aggregated and the DSE calculations shall be made against the aggregated amount.

37 C.F.R. § 201.17(b)(1) (April 2, 1984).

B. The Development of the Cable Industry

When the 1976 Copyright Act was passed, cable television and ancillary technologies were still developing. Cable television developed originally as a means for transmitting television broadcast signals by wire to the homes of paying subscribers. These cable television systems retransmit both local broadcast signals, received off the air by antennae, and distant broadcast signals, customarily received by terrestrial microwave relay systems or by satellite. Cable television systems also transmit nonbroadcast entertainment and informational programing, *i.e.*, programing that is not originally broadcast by a television station. Such nonbroadcast transmissions are made under individually negotiated copyright licenses.

Early cable systems had limited channel capacity, usually twelve systems or less. The principal use of these channels was for retransmission of local broadcast signals received off the air at a well-placed antenna site and distant broadcast signals imported by microwave. The cable systems offered usually both the local and distant broadcast signals for a single package price. By the early 1970's, a few

cable systems began to offer one or more optional tiers of services for an additional charge. The optional tiers usually consisted of one or two channels of commercial-free movies, *i.e.*, Home Box Office ("HBO"), or other entertainment supplied to the cable system by tape or microwave.

A whole new category of nonbroadcast programing emerged as satellite and cable technology developed in the 1970's. This programing today consists of offerings such as ESPN (a sports channel), The Weather Channel, the Health Channel, cultural and religious channels, etc. According to NCTA, "some of these channels are supported principally by advertising" while "others are financed in substantial part by cable systems making direct payments to the supplier for the right to offer the copyrighted programing." NCTA Complaint at 11.

The cable system enters into a written agreement with the program supplier licensing the system to transmit the copyrighted nonbroadcast programing and governing the compensation, advertising rights, and other terms agreed to by the parties. Some cable systems offer the nonbroadcast channel as an optional tier of service at an additional charge. Other systems add the nonbroadcast programing with the system's so-called "basic service" or lowest tier of service and the combined tier is offered at a higher charge. As to the former type of "tiering," the additional tier will sometimes include retransmitted distant broadcast signals. For example, a typical additional tier may include one or more of the satellite delivered broadcast "superstations," *i.e.*, WTBS (Channel 17 in Atlanta) and one or more distant broadcast signals. The marketing practice of "tiering" has become prevalent in the cable industry and cable operators now frequently market their program services in "tiers" consisting of both broadcast and nonbroadcast programing. *See* 49 Fed. Reg. 13029, 13034 col. 3 (April 2, 1984).

C. Positions of the Parties

The Court notes with interest that plaintiffs Cablevision and NCTA see different interpretations of the phrase "gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters" contained in section 111(d) of the Act. Cablevision has interpreted section 111(d)(2)(A) of the Act to require the computation of copyright royalty payments on the basis of the gross receipts paid by subscribers for Cablevision's Basic Service, the tier of service to which all of the subscribers must subscribe prior to receiving any additional tiers of service. Cablevision claims that when the Act was enacted in 1976, the term basic service had a recognized meaning within the cable television industry. "It was the lowest tier of service offered by a cable television system to which all subscribers were required to subscribe before they were permitted to subscribe to any additional tiers of service." Cablevision's Statement of Material Facts as to Which There is No Genuine Issue ¶ 10. Cablevision also asserts that the term " 'basic service' was synonymous with and used interchangeably by the industry with such terms as 'minimum level of service,' 'initial package,' and 'regular subscriber service.' " *Id.* Cablevision's interpretation would exclude from royalty calculations all revenue attributable to an optional tier, whether or not that tier contained distant broadcast programing.

NCTA, on the other hand, argues "that Section 111 of the Act requires the payment of compulsory royalties only for secondary transmissions of primary broadcast transmitters and not for transmissions of other, nonbroadcast programing. . . ."[3] Memorandum of Points and Authorities

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[3] NCTA also challenges the meaning of the term "cable system " as defined in Section 111(f), Title 17, United States Code. Because the Court finds that this issue relates to the definition of a cable system, *see* 17 U.S.C. § 111(f), an issue not presently before the Court, it will not be addressed.

in Support of NCTA's Renewed Motion and Cross-Motion for Summary Judgment and in Opposition to the Copyright Owners' and Copyright Office's Motions for Summary Judgment ("NCTA's Motion for Summary Judgment"), at 19. According to NCTA, such an interpretation would avoid double payment by cable systems for nonbroadcast programing for which negotiated copyright royalties or other forms of compensation have already been paid separately.

The Copyright Owner Defendants take the position that "plaintiff's [Cablevision] private definition of 'basic service' is contrary to section 111's intent and purpose which requires gross receipts from all retransmission services on which any distant or local broadcast signal is provided by the system." Copyright Owner Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Reply in Support of their Motion for Summary Judgment in No. 83-1655 ("Copyright Owner Defendants Opposition") at 10-11. The Copyright Owner Defendants also assert that plaintiff's definition uses terms that were not commonly used in the cable industry in the period 1970-76 and is not the definition used by Congress, the FCC, the franchising authorities with whom plaintiff dealt, or even by the plaintiff. *Id.* at 28. They insist that Cablevision's definition relates to marketing practices alone and not to areas of either congressional or FCC concern.

The Copyright Office Defendants support the arguments made by the Copyright Owner Defendants. Moreover, the Copyright Office argues that its published interpretation of section 111 is entitled to substantial deference by the Court given its expertise in copyright law and therefore should not be overturned since it is not arbitrary, capricious or otherwise not in accordance with law. As to NCTA's allocation of receipts argument, the Copyright Office contends that "[t]here is simply no provision in the copyright law for the allocation of gross receipts for the actual reception by subscribers of each individual copyrighted work." Federal Defendants' Opposition to

Plaintiff's Cross-Motions for Summary Judgment at 18. They assert that "[a] licensing system that would permit every cable operator to account for the retransmission of each broadcast signal containing a copyrighted program would be unworkable within the statutory scheme set by Congress." *Id.* at 17-18.

II. Discussion

A. Standard of Review

It is a well-settled principle that "the construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' " *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968) (citing *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1959)). "Nevertheless, while informed judicial determination is dependent upon enlightenment gained from administrative experience," *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), the courts are the final authorities on issues of statutory construction. Judicial deference cannot be blind or absolute and courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Volkswagenwerk v. FMC*, 390 U.S. at 272 (citing *NLRB v. Brown*, 380 U.S. 278, 291 (1965)). *See also Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

The Supreme Court recently reinforced the concept of judicial deference to an expert agency's statutory interpretation in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the court held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467

U.S. at 844 (footnote omitted). The Court further stated that

> the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

Id. (citations omitted).

Under the *Chevron* view, a court's first task when reviewing an agency's construction of the statute which it administers is to determine whether Congress has directly spoken to the precise question at issue. If Congress has not, "the Court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather . . . the question is whether the agency's answer is based on a permissible construction of this statute." 467 U.S. at 842-43 (footnote omitted). *See also Am. Fed. of Gov. Employees v. FLRA*, 778 F.2d 850, 856 (D.C. Cir. 1985).

B. Statutory Language

The statutory language of section 111(d) that this controversy centers around is the phrase "*gross receipts* from subscribers to the cable service during said period for the *basic service* of providing secondary transmissions of primary broadcast transmitters. . . ." 17 U.S.C. § 111(d)(2)(B) (emphasis added). As noted previously, Congress failed to define the terms "gross receipts" and "basic service," two terms whose definitions affect greatly the calculation of royalty fees due to copyright owners under the compulsory licensing scheme embodied in section 111(d). The Copyright Office, however, subsequently defined "gross receipts" in

the context of the statute so as to "include the full amount of monthly (or other periodic) service fees *for any and all services or tiers of service* which include one or more secondary transmissions [local or distant] of television or radio broadcast signals, for additional set fees, and for converter fees." 37 C.F.R. § 201.17(b)(1) (1984). It is this interpretation that both plaintiffs challenge for reasons already cited.

Based on an examination of the legislation and its history, the Court finds that the Copyright Office's definition of "gross receipts" does not have a reasonable basis in law and frustrates the underlying congressional policy.

The Copyright Office Defendants take the position that,

> [w]here broadcast signals subject to compulsory licensing under section 111 are offered *in combination with* nonbroadcast services such as HBO, as a package, the revenues from both tiers must be combined for reporting purposes. . . . The requirement is clear. *Whenever the two types of service are offered for a single price or, if on separate tiers, whenever it is necessary to subscribe to one tier in order to receive another*, the two services are in reality being offered as a single package of service; if secondary transmissions are included in the package, gross receipts from both tiers or the combined package must be reported and used in calculating copyright royalties.

Letter from Dorothy Schrader, Copyright Office General Counsel, filed June 20, 1986 ("Schrader Letter") at 1 (emphasis in original).

Under the present definition of "gross receipts," cable system operators like plaintiff Cablevision are forced to pay royalties on nonbroadcast signals for which they have already paid simply because these signals are contained in a tier of service with a secondary transmission signal. This

seems unfair to the Court. For example, all parties concede that if an operator markets all his broadcast channels (local and distant signals) in one tier for $10 and separately offers HBO or another movie service for $9, the compulsory royalty fee would be calculated on a $10 base. NCTA's Motion for Summary Judgment at 24-25 (citing Copyright Owner Defendants' Response to Plaintiff [NCTA's] Request for Admission 17). However, if that same operator combines services so that the only available package includes the broadcast channels and the movie channel for $19, under the present definition of "gross receipts" all $19 must be used to compute the broadcast royalty fee. *Id.* Surely, Congress did not intend such an anomalous result.

Congress established the compulsory license fee in the Copyright Act to "compensate the owners of syndicated programming initially broadcast in communities remote from the cable system." *National Cable TV v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1079 (D.C. Cir. 1982). As explained by the Court of Appeals in that case,

> [t]he Act's compulsory license enables cable systems to offer subscribers essentially three types of "basic" service: (a) signals of local stations that are otherwise poorly received, (b) national programming from affiliates of the three commercial networks, regardless of the location of the broadcast station, and (c) non-network or "syndicated," programming originating in a community distant from the cable system. As a result of secondary transmissions, advertisers supporting the first two types of programming reach a larger portion of their intended audience (local and national, respectively). Thus, cable carriage permits the originating station to raise its advertising rates and thereby increase its payments to program producers. The market does not, however, as naturally compensate the owners of syn-

> dicated programming initially broadcast in communities remote from the cable system. Such programming is generally sponsored by local advertisers with little or no interest in the distant cable audience.
>
> Consequently, the Copyright Act requires cable operators to pay royalties as a function of the "distant signal equivalents" (DSEs) they carry. Since it would be impractical for each operator to pay the copyright owners of syndicated programming directly, the Act obliges the operators to pay fees into a royalty pool controlled by the Tribunal which, in turn, determines the appropriate share for different types of copyright owners. The fees are calculated as a percentage of gross receipts from basic subscriber charges, varying according to the number of DSEs carried.

Id. at 1079-80 (footnotes omitted).

Given the rational behind the compulsory license system, the Court finds that Congress did not intend to include revenues from nonbroadcast programing in the calculation of "gross receipts." The congressional reports accompanying the legislation stated that "copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing." H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) at 90. Furthermore, the report states that "[f]or the purpose of computing royalty payments, only receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay-cable services . . . are not included in gross receipts." *Id.* at 96. This language makes clear Congress' intent to exclude revenues attributable to nonbroadcast signals from the calculations of "gross receipts" under section 111(d).

All parties to this controversy would without a doubt agree with this conclusion.

The real point of contention is the Copyright Office Defendants' definition of "gross receipts" which includes revenues from nonbroadcast signals when these signals are offered in combination with broadcast signals subject to compulsory licensing under section 111. According to the Copyright Office, "*[w]henever the two types of service are offered for a single price or, if on separate tiers, whenever it is necessary to subscribe to one tier in order to receive another*, the two services are in reality being offered as a single package of service . . . " and "gross receipts from both tiers or the combined package must be reported and used in calculating copyright royalties." Schrader Letter at 2. NCTA argues that this method of calculating gross receipts results in an inequitable double payment and thus is an unreasonable interpretation of the statute. The Court agrees.

Nonbroadcast signals are obtained by cable operators through privately negotiated contracts which compensate fully the copyright owners for such programing. The definition of "gross receipts" promoted by the defendants results in a "double payment" to the copyright owners since they would receive payment directly from the cable operator pursuant to a contract and again from the Copyright Royalty Tribunal. The Court finds that the mere inclusion of nonbroadcast signals on the same tier with broadcast signals does not magically transform the nonbroadcast signals into signals now subject to the compulsory licensing scheme. They remain outside the licensing scheme and any revenues attributable to them should not be included in the calculation of "gross receipts." A contrary conclusion would contravene the congressional intent to limit royalty payments under the Act to distant nonnetwork programing.

Next the Court must define the term "basic service." Cablevision defines this term as the lowest tier of service offered by a cable television system to which all subscribers are required to subscribe before they car. subscribe to any additional tiers of service. Cablevision's interpretation of section 111 excludes revenues from any optional tier of service, whether or not it contains distant signals. Cablevision also contends that "basic service" is synonymous with the Federal Communications Commission ("FCC") terminology such as "minimum level of service," "initial package," and "regular subscriber service." The Copyright Owner Defendants disagree with Cablevision's definition and assert instead that plaintiff's private marketing definition of "basic service" bears no relationship to the statutory definition intended by Congress. Moreover, the Copyright Owner Defendants argue that section 111 requires the reporting of *all* revenues attributable to both local and distant signals. The Court agrees with the Copyright Owner Defendants.

First, the Court dismisses Cablevision's assertion concerning the synonymous meaning of the term "basic service" with supposedly similar terms used by the FCC. The Court finds that the FCC terms are to be construed independent of and differently from those used in section 111 of the Copyright Act. The FCC and the Copyright Office are federal agencies charged with different areas of responsibility and focus. Terms which appear to mean the same standing alone may, when placed in their proper contest, hold a very different meaning. For this reason, the Court will consider this particular contention of Cablevision no further.

Second, the Court finds that the term "basic service" has already been defined by the U.S. Court of Appeals for the District of Columbia in *National Cable TV v. Copyright Royalty Tribunal*. In *National Cable TV*, the Court defined "basic service" to include the following secondary transmissions: (a) local signals, (b) national network signals, and (c) distant signals. 689 F.2d 1079. Although the

Court in that case did not have the precise issue of the statutory definition of "basic service" before it, this fact in no way diminishes the weight to be given to that Court's definition. Accordingly, the Court finds that it is bound by the definition given to the term "basic service" by the highest court in this Circuit and hereby incorporates that definition into this opinion.

In light of this definition, the Court holds further that the calculation of "gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions . . .", 17 U.S.C. § 111(d)(2)(B), should include all revenues produced by the retransmission of *local and distant signals* no matter what tier of service the signal is included. Like nonbroadcast signals, signals designated as being a part of a cable system's "basic service" do not lose that designation simply by being placed on a higher tier or on a mixed tier. A different conclusion would subvert Congress' express intention of providing compensation to copyright owners of retransmitted distant signals through implementation of the compulsory license statutory scheme.

As noted in the congressional records on section 111,

> [the] retransmission of distant non-network programing by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee [on the Judiciary] has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing [distant signals].

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) at 90.

If the Court were to rule in a manner so as to limit the calculation of "gross receipts" to include only the revenues attributable to signals contained on the lowest or first tier of service, cable operators like Cablevision would be free to tailor their marketing practice in such a way as to lower their royalty payments at the expense of the copyright owners. Under the method of calculation suggested by the Court today, the cable operators are asked to do nothing more than Congress intended — compensate the copyright owners for the retransmission of distant signals.

III. Conclusion

The Court concludes that any calculation of gross receipts under section 111(d) of the Copyright Act of 1976 must include the revenues from both local and distant signals notwithstanding their tier placement. Any revenues attributable to nonbroadcast signals are excluded from this calculation. The Court holds that this conforms to the phrase "gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters. . . ." 17 U.S.C. § 111(d)(2)(B). The Court, therefore, orders the Copyright Office and its Register to amend their definition of "gross receipts" contained in 37 C.F.R. § 201.17(b)(1).

The Copyright Royalty Tribunal shall recalculate the amount of royalty payments owed by plaintiff Cablevision based on this holding of the Court. It is beyond the province of the Court to dictate the specific method of calculating the royalties to be paid by Cablevision. In the instance where local or distant signals are offered in a combination package with other signals at a discount price, the amount to be used in calculating the gross receipts of that package must represent the price of the distant signal

before the discount is taken. For instance, if a cable system provides superstations WTBS and WOR-TV (distant signals) on Tier I for $2, CNN and ESPN (nonbroadcast signals) on Tier II for $2, or both tiers together in a package for $3, the Copyright Royalty Tribunal should use $2 out of the $3 discount price for the combined package in calculating the broadcast retransmission royalty so that the copyright owners are not penalized when "bargain" combinations are made.

Finally, the Court dismisses the counterclaims for statutory damages, as specified in 17 U.S.C., §§ 504(c)(1) and (2), for copyright infringement, injunctive relief, costs, and attorneys fees. The counterclaims allege that Cablevision's failure to file true and complete statement of accounts and to pay the royalty fees provided in 17 U.S.C. § 111(d) which are prerequisites for obtaining compulsory licenses while retransmitting their copyrighted works constitutes copyright infringement. The Court cannot agree with defendants.

The Court finds that while Cablevision did not comply with the letter of the copyright law as interpreted by the Copyright Office and its Register during the relevant period, it did comply with the spirit of the law. After all, not only did Cablevision remit checks totaling over $800,000 to cover royalty payments based on its narrow interpretation, but it also posted a nearly $2 million surety bond to cover the difference between that amount and the amount the Copyright Office claimed was due. These are not the acts of a copyright infringer. Accordingly, the only recovery due to the Copyright Owner Defendants is that provided in section 111(d)(2)(B) of the Copyright Act—royalty payments.

An appropriate order is attached.

/s/JUNE L. GREEN
JUNE L. GREEN
U.S. DISTRICT JUDGE

Dated: July 31, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABLEVISION COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 83-1655
	)	
MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al.	)	
	)	
Defendants.	)	

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 83-2785
	)	
COLUMBIA PICTURES INDUSTRIES, INC., et al.	)	
	)	
Defendants.	)	

CABLEVISION COMPANY	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 84-3097
MOTION PICTURE ASSOCIATION, OF AMERICA, INC., et al.,	)	
	)	
Defendants.	)	

OPINION

Upon consideration of the cross-motions for summary judgment, the respective opposition and reply briefs to the motions, a hearing on the motions, the entire record herein, and for the reasons set forth in the accompanying opinion, it is by the Court this 31st day of July 1986,

ORDERED that the U.S. Copyright Office and its Register shall amend their definition of "gross receipts" contained in 37 C.F.R. § 201.17(b)(1) to conform to the ruling of the Court; it is further

ORDERED that the Copyright Royalty Tribunal shall recalculate the amount of royalty payments owed by plaintiff Cablevision based on the ruling of this Court; it is further

ORDERED that the counterclaims filed by the Copyright Defendants for statutory damages, copyright infringement, injunctive relief, costs and attorneys fees are hereby dismissed; it is further

ORDERED that each party shall bear its own costs; and it is further

ORDERED that these cases are hereby dismissed.

/s/JUNE L. GREEN
JUNE L. GREEN
U.S. DISTRICT JUDGE

17 U.S.C. § 111. Limitations on exclusive rights: Secondary transmissions

(a) Certain secondary transmissions exempted

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than as-

sessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) Secondary transmission of primary transmission to controlled group

Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided, however,* That such secondary transmission is not actionable as an act of infringement if—

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) Secondary transmissions by cable systems

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary

transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or

additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) Compulsory license for secondary transmissions by cable systems

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system

shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted) shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation. Such statement shall also include a special statement of

account covering any non-network television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraphs (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter,

gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of

account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programing consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may des-

ignate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) Nonsimultaneous secondary transmission by cable systems

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, unless—

(A) the program on the videotape is transmitted no more than one time to the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotape, including the commercials

contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to clause (2) erases or destroys or causes the erasure or destruction of, the videotape; and

(D) within forty-five days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to clause (2), to the erasure or destruction of all videotapes made or used during such quarter; and

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to clause (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations, and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission

had been made simultaneously, except that this subclause shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, except that, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it, in accordance with clause (1), may be transferred by one cable system in Alaska to another system in Alaska, by one cable system in Hawaii permitted to make such nonsimultaneous transmissions to another such cable system in Hawaii, or by one cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, to another cable system in any of those three territories, if—

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within thirty days after such contract is entered into, with the Copyright Office (which Office shall make each such contract available for public inspection); and

(B) the cable system to which the videotape is transferred complies with clause (1)(A), (B), (C)(i), (iii), and (iv), and (D) through (F); and

(C) such system provides a copy of the affidavit required to be made in accordance with clause (1)(D) to each cable system making a previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agree-

ment, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located, or a network with which such station is affiliated.

(4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or films, in which the reproduction is embodied.

(f) Definitions

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by

the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter", in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. The "local service area of a primary transmitter", in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

A "distant signal equivalent" is the value assigned to the secondary transmission of any nonnetwork television programing carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programing. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the nonnetwork programing so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission. The foregoing values for independent, network, and noncommercial educational stations are subject, however, to the following exceptions and limitations. Where the rules and regulations

of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and such rules and regulations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, or where such rules and regulations in effect on the date of enactment of this Act permit a cable system, at its election, to effect such deletion and substitution of a nonlive program or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no value shall be assigned for the substituted or additional program; where the rules, regulations, or authorizations of the Federal Communications Commission in effect on the date of enactment of this Act permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year. In the case of a station carried pursuant to the late-night or specialty programing rules of the Federal Communications Commission, or a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth above, as the case may be, shall be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

A "network station" is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programing supplied by such networks for a substantial part of that station's typical broadcast day.

An "independent station" is a commercial television broadcast station other than a network station.

A "noncommercial educational station" is a television station that is a noncommercial educational broadcast station as defined in section 397 of title 47.

17 U.S.C. § 701. The Copyright Office: General Responsibilities and Organization

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian's general direction and supervision.

17 U.S.C. § 702. Copyright Office Regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

17 U.S.C. § 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created an independent Copyright Royalty Tribunal in the legislative branch.

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be—

(1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 115 and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d)(2)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed

as of the date of enactment of this Act: *Provided*, That if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(2)(B) shall be permitted: *And provided further*, That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Commission may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmission.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users: *Provided*, That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or frac-

tion thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment; and

(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116, and to determine in cases where controversy exists, the distribution of such fees.

(c) As soon as possible after the date of enactment of this Act, and no later than six months following such date, the President shall publish a notice announcing the initial appointments provided in section 802, and shall designate an order of seniority among the initially-appointed commissioners for purposes of section 802(b).

17 U.S.C.§ 802. Membership of the Tribunal

(a) The Tribunal shall be composed of five commissioners appointed by the President with the advice and consent of the Senate for a term of seven years each; of the first five members appointed, three shall be designated to serve for seven years from the date of the notice specified in section 801(c), and two shall be designated to serve for five years from such date, respectively. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).

(b) Upon convening the commissioners shall elect a chairman from among the commissioners appointed for a full seven-year term. Such chairman shall serve for a term of one year. Thereafter, the most senior commissioner who has not previously served as chairman shall serve as chairman for a period of one year, except that, if all commissioners have served a full term as chairman, the most senior commissioner who has served the least number of terms as chairman shall be designated as chairman.

(c) Any vacancy in the Tribunal shall not affect its powers and shall be filled, for the unexpired term of the appointment, in the same manner as the original appointment was made.

17 U.S.C.§ 803. Procedures of the Tribunal

(a) The Tribunal shall adopt regulations, not inconsistent with law, governing its procedure and methods of operation. Except as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Ad-

ministrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, chapter 5, subchapter II and chapter 7).

(b) Every final determination of the Tribunal shall be published in the Federal Register. It shall state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination.

17 U.S.C.§ 804. Institution and Conclusion of Proceedings

(a) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 115 and 116, and with respect to proceedings under section 801(b)(2)(A) and (D)—

> (1) on January 1, 1980, the Chairman of the Tribunal shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter; and
>
> (2) during the calendar years specified in the following schedule, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. The Tribunal shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Tribunal determines that the petitioner has a significant interest, the Chairman shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with notice of commencement of proceedings under this chapter.

(A) In proceedings under section 801(b)(2)(A) and (D), such petition may be filed during 1985 and in each subsequent fifth calendar year.

(B) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, such petition may be filed in 1987 and in each subsequent tenth calendar year.

(C) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 116, such petition may be filed in 1990 and in each subsequent tenth calendar year.

(b) With respect to proceedings under subclause (B) or (C) of section 801(b)(2), following an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established by the Tribunal, may, within twelve months, file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. In this event the Tribunal shall proceed as in subsection (a)(2), above. Any change in royalty rates made by the Tribunal pursuant to this subsection may be reconsidered in 1980, 1985, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(2)(B) or (C), as the case may be.

(c) With respect to proceedings under section 801(b)(1), concerning the determination of reasonable terms and rates of royalty payments as provided in section 118, the Tribunal shall proceed when and as provided by that section.

(d) With respect to proceedings under section 801(b)(3), concerning the distribution of royalty fees in certain circumstances under sections 111 or 116, the Chairman of the Tribunal shall, upon determination by the Tribunal that a controversy exists concerning such distri-

bution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.

(e) All proceedings under this chapter shall be initiated without delay following publication of the notice specified in this section, and the Tribunal shall render its final decision in any such proceeding within one year from the date of such publication.

17 U.S.C. § 805. Staff of the Tribunal

(a) The Tribunal is authorized to appoint and fix the compensation of such employees as may be necessary to carry out the provisions of this chapter, and to prescribe their functions and duties.

(b) The Tribunal may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5.

17 U.S.C. § 806. Administrative support of the Tribunal

(a) The Library of Congress shall provide the Tribunal with necessary administrative services, including those related to budgeting, accounting, financial reporting, travel, personnel, and procurement. The Tribunal shall pay the Library for such services, either in advance or by reimbursement from the funds of the Tribunal, at amounts to be agreed upon between the Librarian and the Tribunal.

(b) The Library of Congress is authorized to disburse funds for the Tribunal, under regulations prescribed jointly by the Librarian of Congress and the Tribunal and approved by the Comptroller General. Such regulations shall establish requirements and procedures under which every voucher certified for payment by the Library of Congress under this chapter shall be supported with a certification by a duly authorized officer or employee of the Tribunal, and shall prescribe the responsibilities and accountability of said officers and employees of the Tribunal with respect to such certifications.

17 U.S.C. § 807. Deduction of costs of proceedings

Before any funds are distributed pursuant to a final decision in a proceeding involving distribution of royalty fees, the Tribunal shall assess the reasonable costs of such proceeding.

17 U.S.C. § 808. Reports

In addition to its publication of the reports of all final determinations as provided in section 803(b), the Tribunal shall make an annual report to the President and the Congress concerning the Tribunal's work during the preceding fiscal year, including a detailed fiscal statement of account.

17 U.S.C. § 809. Effective date of final determinations

Any final determination by the Tribunal under this chapter shall become effective thirty days following its publication in the Federal Register as provided in section 803(b), unless prior to that time an appeal has been filed pursuant to section 810, to vacate, modify, or correct such determination, and notice of such appeal has been served on all parties who appeared before the Tribunal in the proceeding in question. Where the proceeding involves the distribution of royalty fees under sections 111 or 116, the Tribunal shall, upon the expiration of such thirty-day period, distribute any royalty fees not subject to an appeal filed pursuant to section 810.

17 U.S.C. § 810. Judicial review

Any final decision of the Tribunal in a proceeding under section 801(b) may be appealed to the United States Court of Appeals, within thirty days after its publication in the Federal Register by an aggrieved party. The judicial review of the decision shall be had, in accordance with chapter 7 of title 5, on the basis of the record before the Tribunal. No court shall have jurisdiction to review a final decision of the Tribunal except as provided in this section.

37 C.F.R. § 201.2(a)(3). Information given by the Copyright Office.

(a) In general. (1) Information relative to the operations of the Copyright Office is supplied without charge. A search of the records, indexes, and deposits will be made for such information as they may contain relative to copyright claims upon application and payment of the statutory fee. The Copyright Office, however, does not undertake the making of comparisons of copyright deposits to determine similarity between works.

(2) The Copyright Office does not furnish the names of copyright attorneys, publishers, agents, or other similar information.

(3) In the administration of the Copyright Act in general, the Copyright Office interprets the Act. The Copyright Office, however, does not give specific legal advice on the rights of persons, whether in connection with particular uses of copyrighted works, cases of alleged foreign or domestic copyright infringement, contracts between authors and publishers, or other matters of a similar nature.

37 C.F.R. § 201.17. Statements of Account covering compulsory licenses for secondary transmissions by cable systems.

* * *

(b) *Definitions.* (1) Gross receipts for the "basic service of providing secondary transmissions of primary broadcast transmitters" include the full amount of monthly (or other periodic) service fees for any and all services or tiers of service which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees. All such gross receipts shall be aggregated and the DSE calculations shall be made against the aggregated amount. Gross receipts for secondary transmission services do not include installation (including connection, relocation, disconnection, or recon-

nection) fees, separate charges for security, alarm or facsimile services, charges for late payments, or charges for pay cable or other program origination services: *Provided* That, the origination services are not offered in combination with secondary transmission service for a single fee.

* * *

(c) *Accounting periods and deposit.*

* * *

(2) Upon receiving a Statement of Account and royalty fee, the Copyright Office will make an official record of the actual date when such Statement and fee were physically received in the Copyright Office. Thereafter, the Office will examine the Statement and fee for obvious errors or omissions appearing on the face of the documents, and will require that any such obvious errors or omissions be corrected before final processing of the documents is completed. If, as the result of communications between the Copyright Office and the cable system, an additional fee is deposited or changes or additions are made in the Statement of Account, the date that additional deposit or information was actually received in the Office will be added to the official record of the case. However, completion by the Copyright Office of the final processing of a Statement of Account, and royalty fee deposit shall establish only the fact of such completion and the date or dates of receipt shown in the official record. It shall in no case be considered a determination that the Statement of Account was, in fact, properly prepared and accurate, that the correct amount of the royalty fee had been deposited, that the statutory time limits for filing had been met, or that any other requirements to qualify for a compulsory license have been satisfied.

Rule 28.1 List

Adams-Russell Acquisition Co., Inc.
American Movie Classics Company
Atlantic Cable Television Publishing Corporation
Boston Transport Company
Bravo Company
Cable Networks, Inc.
Cablevision Area 9 Corporation
Cablevision Company
CSC Holdings Company
Cablevision Consolidations Company
Cablevision Corporation
Cablevision Equity, Inc.
Cablevision Fairfield Corporation
Cablevision Finance Corporation
Cablevision Finance Limited Partnership
Cablevision Headquarters Investments
Cablevision of Boston Limited Partnership
Cablevision of Brookline Limited Partnership
Cablevision of Chicago
Cablevision of Connecticut Corporation
Cablevision of Connecticut, Limited Partnership
Cablevision of Geauga County
Cablevision of Illinois
Cablevision of Michigan, Inc.
Cablevision of New Jersey
Cablevision of New York City
Cablevision of Ohio, Ltd.
Cablevision of the Midwest, Inc.
Cablevision Program Services Company
Cablevision Programming Investments
Cablevision Programming New England Corporation
Cablevision Programming of Southern Connecticut Limited Partnership
Cablevision Systems Boston Corporation
Cablevision Systems Brookline Corporation
Cablevision Systems California Corporation

Cablevision Systems Cambridge Corporation
Cablevision Systems Chicago Corporation
Cablevision Systems Company
Cablevision Systems Corporation
Cablevision Systems Development Company
Cablevision Systems Dutchess Corporation
Cablevision Systems East Hampton Corporation
Cablevision Systems Great Neck Corporation
Cablevision Systems Harbor View Corporation
Cablevision Systems Huntington Corporation
Cablevision Systems Islip Corporation
Cablevision Systems Jersey City Corporation
Cablevision Systems Long Island Corporation
Cablevision Systems New York City Corporation
Cablevision Systems Ohio Investment Corporation
Cablevision Systems of Southern Connecticut Limited Partnership
Cablevision Systems of Philadelphia Corporation
Cablevision Systems Sacramento Corporation
Cablevision Systems Services Corporation
Cablevision Systems Suffolk Corporation
Cablevision Systems UK Corporation
Cablevision Systems Westchester Corporation
Chicago Cablevision Investments
Chicago Transport Company
Communications Management Corporation
Communications Development Corporation
Harborview Cablevision
Jarmain Cable Investments of Ohio, Inc.
Jarmain Communications of Ohio, Inc.
Ohio Cablevision Investors, Ltd.
Metro Financial Corporation
Morson Corporation
Rainbow Advertising Sales Company
Rainbow Advertising Sales Corporation
Rainbow International Film Corporation
Rainbow Network Communications

Rainbow News 12 Company
Rainbow Program Enterprises
Rainbow Programming Services Company
Sacramento Cable Company
Sagamore Baseball Corporation
Space Cable of Ohio, Ltd.
Space Cable of Strongsville, Ltd.
SportsChannel Associates
SportsChannel Chicago Associates
SportsChannel Florida Associates
SportsChannel New England Limited Partnership
SportsChannel Prism Associates
Sportscene New England, Inc.
Sportsview New England, Inc.

No. 87-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CABLEVISION COMPANY,
Petitioner,
v.
MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*, UNITED STATES COPYRIGHT OFFICE AND ITS REGISTER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*

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May 4, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's interpretation of 17 U.S.C. § 111(d)(1)(B) on the grounds that it disregards a critical part of the statutory language, and would allow cable systems to frustrate the purpose of the statute.

RULE 28.1 LISTING

The following are parents, subsidiaries (except wholly-owned subsidiaries) or affiliates of respondents Motion Picture Association of America, Inc.; Columbia Pictures Industries, Inc.; Embassy Communications; MGM/UA Communications Co.; Orion Pictures Corporation; Paramount Pictures Corporation; Turner Entertainment Company; Twentieth Century-Fox Film Corporation; Universal Pictures, a Division of Universal City Studios, Inc.; and Warner Bros. Inc.:

Chris-Craft Industries, Inc.
The Coca-Cola Company
Fox Television Stations, Inc.
Gulf & Western
MCA, Inc.
The News Corporation Limited
Turner Broadcasting System, Inc.
Warner Communications, Inc.

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BRIEF IN OPPOSITION OF RESPONDENTS MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*

STATEMENT OF THE CASE

A. The Statutory Scheme

The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (1982 & Supp. IV 1986), grants cable systems the privilege of a compulsory license to retransmit copyrighted broadcast programming, 17 U.S.C.

§ 111(c), upon timely semi-annual deposit with the Copyright Office of a statement of account and royalty fee, 17 U.S.C. § 111(d)(1).[1] Failure to make the required deposits renders a cable system liable for copyright infringement. 17 U.S.C. § 111(c)(2). The royalty fees plus interest are later distributed by the Copyright Royalty Tribunal to copyright owners pursuant to §§ 111(d)(3) and (4).

Royalty fees are "computed on the basis of specified percentages of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters . . . ." 17 U.S.C. § 111(d)(1)(B). For the largest cable systems, such as petitioner, the "specified percentages" are based on the "distant signal equivalent" ("DSE") values of the television stations retransmitted by the systems. *Id.*; *see* Pet. App. 8a-9a. The DSEs measure the amount of distant non-network programming retransmitted. Congress determined that the cable retransmission of such programming "causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed," H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659.

The focus of this litigation is on the "gross receipts" part of the calculation; the issue is the proper

[1] Congress amended 17 U.S.C. § 111(d) in 1986, by eliminating the original § 111(d)(1) and redesignating the remaining subsections. Pub. L. No. 99-397, § 2(a)(4), (5), 100 Stat. 848 (1986). Petitioner continues to use the pre-1986 language in its Petition; and, therefore, what is now § 111(d)(1) appears as § 111(d)(2) at pages 63a-65a of the Appendix to the Petition (hereinafter "Pet. App."). Respondents are using the current statutory designations.

interpretation of the statutory language "gross receipts . . . for the basic service of providing secondary transmissions of primary broadcast transmitters."

B. The Copyright Office Rulemaking Proceedings

On June 27, 1978, pursuant to its general authority to issue regulations under 17 U.S.C. § 702 and its specific authority under 17 U.S.C. § 111(d)(1) to issue regulations governing the payment of royalty fees, the Copyright Office adopted a regulation defining "gross receipts" as "the full amount of monthly (or other periodic) service fees for television and radio retransmission service, additional set fees, and converter fees." 43 Fed. Reg. 27,827, 27,832 (1978). The Office also adopted standardized statement-of-account forms to be used by cable operators in their semi-annual filings. *Id.* at 27,827. The instructions on the forms require cable systems to identify separately all categories of secondary transmission service, which form the basis of "gross receipts." Court of Appeals Appendix (hereinafter "C.A. App.") 444, 449; *see also* 43 Fed. Reg. at 27,833 (37 C.F.R. § 201.17(e)(6), (7) (1978)). In addition, the Office determined that, where cable systems bundle broadcast retransmission services and local origination services for a single monthly fee, they cannot "allocate" a portion of the fee to the local origination services and exclude that portion from "gross receipts." 43 Fed. Reg. at 27,828. The origination and retransmission services are "clearly part of an integral package offered to subscribers," and there is "no statutory justification or basis for allocating the monthly fee." *Id.*

In 1980, cable operators asked the Copyright Office to revise its definition of "gross receipts" in light of new marketing strategies and technological advances. 45 Fed. Reg. 45,270, 45,273 (1980). Accordingly, the Office commenced further rulemaking proceedings to consider, among other things, whether a cable system that carries distant television stations on one or more tiers that not all subscribers receive must include "any, all, or part of the tiered service gross receipts as part of its 'basic service' gross receipts." 46 Fed. Reg. 30,649, 30,651 (1981); *see also* Pet. App. 13a.

On July 28, 1981, the Office held a public hearing on the rulemaking. *See* 49 Fed. Reg. 13,029, 13,034 (1984). In its prepared testimony, the National Cable Television Association ("NCTA"), the cable television trade association, recognized that "gross receipts" are not limited to receipts from a cable system's lowest tier. C.A. App. 334; *see* 49 Fed. Reg. at 13,034-35. Petitioner Cablevision Company ("Cablevision") did not appear at the hearing and did not submit comments proposing that its interpretation of "gross receipts" be adopted.

The final regulation adopted by the Copyright Office in 1984 reaffirmed that "gross receipts" include "the full amount of monthly (or other periodic) service fees for any and all services or tiers of service which include one or more secondary transmissions of television or radio broadcast signals." 49 Fed. Reg. at 13,037 (37 C.F.R. § 201.17(b)(1)(1984)). The Office explained:

> [T]he Copyright Act does not permit any proration or other allocation of either DSE's or gross receipts by subscriber groups where any

> secondary transmission service is combined with nonbroadcast services in program packages, clusters, or tiers. We confirm in regulations the interpretation of the Copyright Act applied by the Licensing Division of the Office since 1978.

49 Fed. Reg. at 13,035. The Office noted that "[t]o a large extent . . . a cable system can control its own 'tiering' destiny . . . [by] offer[ing] secondary transmission services solely as part of minimum service or on discrete tiers, excluding expensive origination services in either case." *Id.*

C. Proceedings Below

Prior to May 1979, Cablevision marketed, for $7.00 per month, a 28-channel tier ("Family Cable"), which included all local and distant broadcast signals and all basic nonbroadcast programming. C.A. App. 572-73. In May 1979, Cablevision split this tier into two separate tiers. It placed 19 of the 28 channels, including all local broadcast signals, in a "first" or "lowest" tier, priced it at $4.50 per month, and called it "Basic Service." *Id.* 573. It bundled the remaining nine channels, including all distant broadcast signals, in a separate tier (which retained the name "Family Cable"), and priced it separately at $5.00 per month. *Id.* 573-75. The price for the 28 channels was, thus, increased from $7.00 to $9.50. Approximately 97-98% of Cablevision's subscribers purchased both tiers. *Id.* 574. Since 1979, the price for the first tier has remained $4.50, while the price for the second tier has been increased. *Id.* 573-74.

In its royalty-fee filings through the first half of 1979, Cablevision reported all subscriber revenues from its 28-channel service as "gross receipts." *Id.* 572. Thereafter, it reported as "gross receipts" only

the revenues from its 19-channel tier, *id.* 575-76, but in calculating royalty fees it used the DSE values applicable to the 9-channel tier. The result was a substantial drop in "gross receipts" and royalty fees, even as Cablevision's revenues from subscribers for the same group of 28 channels were increasing. *Id.* 695. Cablevision did not disclose its interpretation of "gross receipts" in its filings with the Copyright Office, and indeed concealed its reliance on that interpretation.[2] Cablevision has conceded that it is not aware of any other cable system that has used its method of computing "gross receipts." *Id.* 540-41.[3]

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[2] The statement-of-account form requires in Space E disclosure of subscriber and rate information for "all categories of 'secondary transmission service' . . . : that is, the retransmission of television . . . broadcasts by your system to subscribers." Information about services that do not include any secondary transmissions is to be included in Space F. C.A. App. 431. After May 1979, Cablevision reported only information for its first tier in Space E; and it reported information for its higher-priced tier—which included all of its distant-signal broadcast retransmissions—in Space F, even though, under the instructions for the form, that information belonged in Space E. *Id.* 444, 576. Cablevision thus concealed its retransmission and reporting practices. In later years, Cablevision's overall royalty payments increased for the reasons discussed at pages 17-18, *infra*.

[3] In the Copyright Office rulemaking proceedings, fifty-six cable systems proposed that "gross receipts" be interpreted to include only revenues from "basic service," which they described as "the service available to all cable television subscribers and which includes the local television channels *and most or all of the distant television stations offered.*" C.A. App. 422 (emphasis added). By contrast, beginning in May 1979 Cablevision's "Basic Service" tier included *none* of the distant signals Cablevision offered; all such signals were placed on a higher tier. *Id.* 574-75.

Respondents eventually learned of these practices and asked Cablevision to amend its past statements of account and pay additional royalty fees owed. Cablevision then sued respondents for a declaratory judgment that "gross receipts" under § 111(d)(1)(B) include only receipts from a cable system's "lowest" tier of service. Respondents filed counterclaims for copyright infringement.

Both the district court and the court of appeals squarely rejected Cablevision's interpretation of "gross receipts." The district court held that all tiers of service that contain broadcast signals must be included in the calculation of "gross receipts." Pet. App. 53a. Similarly, the court of appeals unanimously concluded that Cablevision's interpretation is "untenable." *Id.* 29a.[4]

REASONS FOR DENYING THE WRIT

Cablevision has not demonstrated any basis for review by this Court. Both the district court and the court of appeals correctly concluded that Cablevision's proposed interpretation is untenable. That interpretation, which has not been employed by any other cable operator in the United States, is inconsistent with the language of § 111 and would frustrate its underlying purpose. This case does not raise any broad issues worthy of the Court's attention.

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[4] Respondents' counterclaims are pending in the district court. That court originally dismissed the counterclaims, Pet. App. 55a, but the court of appeals reversed the dismissal and remanded for further proceedings, *id.* 4a.

1. The court of appeals's rejection of Cablevision's interpretation does not raise the questions presented in the Petition.

Cablevision's entire Petition is based on the erroneous premise that its interpretation of "gross receipts" was rejected by the court of appeals only "through the exercise of deference to the Copyright Office," Pet. 25. In fact, although the court concluded that the Office's interpretation was entitled to deference, the court made it clear that it was *not* relying on deference as a basis for rejecting Cablevision's interpretation:

> Even where two equally tenable interpretations of a statute are put forward, one by the agency charged with administering the Act—as we have held the Copyright Office to be—and the other by a private party, we will favor the former. *See Udall* v. *Tallman*, 380 U.S. 1, 4 (1965). *But on examination we find Cablevision's position untenable*, since it could lead to the absurdity of only a miniscule portion of revenues, at the option of a cable company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective.

Pet. App. 29a-30a (footnote omitted; emphasis added); *see also id.* 4a. Similarly, the district court rejected Cablevision's interpretation on the ground that it "would *subvert Congress' express intention* of providing compensation to copyright owners of retransmitted distant signals." *Id.* 53a (emphasis added).

Thus, the questions concerning deference raised by Cablevision are not presented by the rejection of its interpretation by the courts below. Answering Cablevision's questions presented (Pet. i) in the negative,

as Cablevision contends they should be answered, would not affect the conclusion of either court below that Cablevision's interpretation is untenable.

2. The courts below were correct in rejecting Cablevision's interpretation.

As the court of appeals noted, under Cablevision's interpretation "the first tier—basic service in its parlance—may contain anything the cable system chooses." Pet. App. 29a. The first tier need not contain any broadcast retransmissions. *Id.* 22a. Under Cablevision's interpretation, "gross receipts" need not include *any* revenues related to a cable system's broadcast retransmission service.

To allow a cable operator to reduce its royalty-fee payments in this manner would frustrate a fundamental purpose of § 111: to compensate copyright owners for the retransmission by cable systems of distant non-network broadcast signals. *See* H.R. Rep. No. 1476 at 90; Pet. App. 6a-7a, 53a-54a. Cablevision's approach allowed it to make royalty-fee payments bearing no relation to its revenues from the service providing the very retransmission activity that Congress concluded required compensation to copyright owners. The courts below were unquestionably correct in rejecting an interpretation of "gross receipts" that produced a result so directly contrary to Congress's intent.

As the court of appeals explained, Cablevision's interpretation also ignores a critical part of the relevant statutory language. Under Cablevision's interpretation of "basic service," the phrase "of providing secondary transmissions of primary broadcast transmitters" is effectively read out of the statute:

> Indeed, since Cablevision contends basic service can contain anything the cable system chooses, and not necessarily just—or even any—broadcast retransmissions, *see infra* p. 29 [Pet. App. 29a], the phrase "of providing secondary transmissions of primary broadcast transmitters," which would seem to serve the purpose in the statute of explaining "basic service," could actually *contradict* "basic service."

Pet. App. 22a (emphasis in original).

3. The Copyright Office's interpretation of section 111 is entitled to deference.

The questions concerning deference that Cablevision raises do not warrant review. Ample precedent establishes that interpretations by the Copyright Office are entitled to deference. In both *Goldstein* v. *California*, 412 U.S. 546, 567-69 (1973), and *Mazer* v. *Stein*, 347 U.S. 201, 213 (1954), this Court deferred to the Office's construction of the law. Similarly, in *DeSylva* v. *Ballentine*, 351 U.S. 570, 577-78 (1956), the Court made clear that it would have accorded deference to the Office's position but for the fact that the Office had not made a "confident interpretation" of the statute.[5] Numerous lower court decisions have also accorded deference where the Office's interpretation of the law addressed the issue before the court.[6] In light of these authorities, the

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[5] The Court emphasized that it "would ordinarily give weight to the interpretation of an ambiguous statute by the agency charged with its administration, *cf. Mazer* v. *Stein*, 347 U.S. 201, 211-13." 351 U.S. at 577-78.

[6] *See Norris Industries, Inc.* v. *ITT*, 696 F.2d 918, 922 (11th Cir.), *reh. den.*, 703 F.2d 582, *cert. denied*, 464 U.S. 818 (1983); *Schnapper* v. *Foley*, 667 F.2d 102, 110 (D.C. Cir.

court of appeals would have been justified in flatly rejecting the suggestion that the Copyright Office's interpretations are not entitled to deference.

But the court carefully confined its analysis to the statutory provision at issue, and emphasized that its conclusion concerning the deference due the Copyright Office "does not extend beyond the bounds of [the Office's] interpretation of section 111 . . . ." Pet. App. 18a. The court also noted that deference to the Office would serve to discourage excessive litigation concerning § 111, which could defeat Congress's intent to effectuate the licensing of copyrighted programming without burdensome transaction costs. *Id.* 18a-19a; *see* H.R. Rep. No. 1476 at 89.[7]

1981), *cert. denied*, 455 U.S. 948 (1982); *Esquire, Inc.* v. *Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 297-98 (4th Cir. 1978); *Hoffenberg* v. *Kaminstein*, 396 F.2d 684, 685 (D.C. Cir.) (*per curiam*), *cert. denied*, 393 U.S. 913 (1968).

Cablevision's attempt to distinguish *Mazer, Norris, Schnapper, Esquire,* and *Eltra* as involving "copyrightability," Pet. 13 n.7, cannot withstand scrutiny. In each case, the question of copyrightability turned on the proper interpretation of the copyright laws. There is no principled basis for limiting deference to the Copyright Office's legal interpretations to the area of copyrightability. Moreover, *DeSylva* did not involve an issue of copyrightability, but rather the question of who was entitled to renew a copyright after an author's death. Finally, Cablevision is incorrect when it asserts that in each of the decisions it cites the court noted that "Congress had approved and ratified the Office's position when it revised the copyright laws in 1976." *Id. Mazer* was decided in 1954, long before the revision of the copyright laws in 1976.

[7] *See also* Pet. App. 17a ("Given Congress' awareness of the rapid changes taking place in the cable industry, we cannot believe that Congress intended that there be no administrative

The decision below does not conflict with *DeSylva* v. *Ballentine* or *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975). The court of appeals carefully considered the contention that the Copyright Office had reached "the point of excessive diffidence identified in *DeSylva*," and concluded that it had not: "we conclude that the Office did see itself as having the authority to issue regulations and did make 'a confident interpretation of the statute.' *DeSylva*, 351 U.S. at 577." Pet. App. 20a. The fact-bound determination that in this instance the Copyright Office had confidently construed the statute plainly does not merit review by this Court, and, in any event, was correct. When it issued its final regulation in 1984, the Office expressly invoked its authority to interpret the statute. *See* 49 Fed. Reg. 13,029, 13,031 (1984).[8]

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overseer of this scheme."). Although deference to agency interpretations does not depend on "a finding of agency 'expertise,'" Pet. 18, *see Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984), the Copyright Office has had considerable experience in administering the compulsory license provisions of the Copyright Act of 1976, *see* Pet. App. 19a. The Office was also extensively involved in the legislative process leading to passage of that legislation, *see Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 159-61 (1985), and prepared a report for Congress concerning the history of legislative attempts to determine the copyright liability of cable television systems, *see* H.R. Rep. No. 1476 at 89.

[8] Cablevision errs (Pet. 8, 15) in interpreting a Copyright Office regulation as suggesting that the Office lacks power to issue legal opinions. The Office simply has chosen for prudential reasons not to "give *specific legal advice*" to members of the public. 37 C.F.R. § 201.2(a)(3) (1987) (emphasis added). The same regulation makes clear that "[i]n the ad-

Nor does the opinion below conflict with *Bartok*. First, in *Bartok* it was "unlikely . . . that the Register of Copyrights considered the situation" before the court. 523 F.2d at 947 n.10. The Register had merely adopted a form setting forth a general definition of "posthumous" work, without addressing the issue that later came before the court. *Id.* at 946. Here, the Copyright Office conducted rulemaking proceedings and adopted a regulation that directly addresses the disputed issues in this litigation. Second, as the court below noted, because the Second Circuit "held the interpretation put forward by the Office was inconsistent with legislative intent, . . . its statement on the deference due the Office would seem to be a dictum." Pet. App. 21a. Third, the court below did not take issue with the *Bartok* dictum. The court emphasized that even if that dictum were "generally sound," it should not be extended to § 111 (which was enacted after *Bartok* was decided) because "Congress saw a need for a continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role." *Id.* Clearly, no conflict meriting this Court's attention arises where a court declines to apply a dictum in a prior opinion to a different statutory provision.

Cablevision's argument that the Copyright Office's interpretation was not entitled to deference is also based on several erroneous or irrelevant premises. First, the fact that the Office does not initiate enforcement actions (Pet. 15, 16 n.11) is irrelevant to the question of deference. Numerous decisions of this Court and the courts of appeals according deference

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ministration of the Copyright Act in general, the Copyright Office interprets the Act." *Id.*

to the Office's views have not even considered it pertinent that the Office does not bring enforcement actions.[9] Second, the Copyright Office's description of the challenged regulation as "interpretive," 49 Fed. Reg. at 13,031, does not make deference inappropriate.[10] Third, contrary to what Cablevision suggests (Pet. 17-18), the final regulation issued in 1984 is fully consistent with the 1978 regulation.[11]

INS v. *Cardoza-Fonseca*, 107 S. Ct. 1207 (1987), does not establish that a court may freely substitute its view for that of an agency on "a pure question of statutory construction," Pet. 21. *Cardoza-Fonseca* merely reaffirms the first step of the *Chevron* test:

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[9] *See Goldstein* v. *California*, 412 U.S. at 568-69; *Mazer* v. *Stein*, 347 U.S. at 213; *Norris Industries, Inc.* v. *ITT*, 696 F.2d at 922; *Schnapper* v. *Foley*, 667 F.2d at 110; *Esquire, Inc.* v. *Ringer*, 591 F.2d at 801; *Eltra Corp.* v. *Ringer*, 579 F.2d at 297-98; *Hoffenberg* v. *Kaminstein*, 396 F.2d at 685. This Court has also deferred to the views of other agencies not empowered to commence enforcement actions. *See, e.g., Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (Council on Environmental Quality).

[10] *See, e.g., Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 106 S. Ct. 2860, 2868 (1986) (executive agreement with foreign country); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (FDIC's policy of excluding standby letters of credit from statutory provision governing deposits); *United States* v. *City of Fulton*, 475 U.S. 657, 666 (1986) (Department of Energy regulations interpreting the Flood Control Act); *United States* v. *Clark*, 454 U.S. 555, 565 (1982) (interpretive regulations promulgated by the Civil Service Commission); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-66 (1980) (Federal Reserve Board staff opinions); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (EEOC guidelines).

[11] See pages 3-5, *supra*.

if Congress's intent is clear, "that is the end of the matter," *Chevron*, 467 U.S. at 842; the question of deference does not arise. Any notion that the *Chevron* test is inapplicable to "pure questions of statutory construction" was laid to rest in *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987).

4. The court of appeals did not hold that Congress's intent may be discarded as "outmoded."

The decision below does not "set[] the precedent that Congress' intent, once found, need not be effected if the court or an agency deems such intent to be outmoded," Pet. 22. Cablevision mischaracterizes the court of appeals's reasoning. The court did not conclude that Congress intended that "gross receipts" be limited to revenues collected from the "first tier of service," *id.* 21, and then discard that intent as "outmoded." The court stated:

> The legislative history shows that Congress contemplated only one "tier" containing a mixture of broadcast and cable-originated stations. All higher "tiers" in this model contained only cable-originated stations for a separate fee, and these pay cable services were excluded from gross receipts. *See* H.R. Rep. No. 94-1476, *supra*, at 96. Thus *the tier from which gross receipts were to be calculated was at the same time all tiers (the only one) containing a broadcast signal—the Copyright Office's view—and the first tier alone —Cablevision's position.*

Pet. App. 27a (emphasis added).

The court adopted the Copyright Office's interpretation over Cablevision's not because it considered § 111 "outmoded," but because (1) "[t]he Copyright

Office's regulation is . . . the interpretation before us that best accounts for the statutory language,"[12] *id.* 22a; (2) the regulation "evinces a full understanding of the structure and purpose that underlie that language," *id.;* and (3) Cablevision's interpretation "could lead to the absurdity of only a miniscule portion of revenues, at the option of a cable company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective," *id.* 29a-30a (footnote omitted). Cablevision's attack on the court of appeals's opinion thus distorts the court's actual reasoning.[13]

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[12] It is ironic that Cablevision invokes the principle that "statutes are to be interpreted so that no word is rendered superfluous," Pet. 26 n.24. The court below relied on that very principle, Pet. App. 21a-22a, in ruling that Cablevision's interpretation is untenable. The court noted that under Cablevision's interpretation of "basic service," "all language that follows that term is superfluous." *Id.* 22a. See also pages 9-10, *supra.*

[13] The court of appeals did not "ignore[]" (Pet. 23) the materials presented by Cablevision in support of its interpretation of "gross receipts." The court carefully considered Cablevision's arguments and found them unpersuasive. Pet. App. 26a-30a.

Addressing petitioner's claim that its affidavits demonstrate that "basic service" equals first tier, the court found that "one can concede each step and not reach Cablevision's conclusion" because "Congress *never considered* the situation of multiple tiers containing broadcasting, and use of an industry definition from a period when the practice under consideration was not widespread in the industry is singularly unenlightening." *Id.* 27a-28a (emphasis in original; footnote omitted). (The affidavits also addressed the term "basic service" rather than the relevant statutory language, "basic service of providing secondary transmissions of primary broadcast transmitters,"

Cablevision is far off the mark in claiming, Pet. 27, that the decision below will result in "windfall payments" to copyright owners and "exorbitant cost" to cable operators. The increase in royalty fees since the compulsory license provisions became effective in 1978 is not due to the Copyright Office's interpretation of § 111(d)(1)(B) (which has remained the same throughout this period), but to the enormous growth in the number of cable subscribers and cable industry revenues, the FCC's repeal of its restrictions on carriage of distant signals by cable systems and the consequent royalty rate adjustment by the Copyright Royalty Tribunal, *see National Cable Television Association* v. *Copyright Royalty Tribunal*,

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and relied on concepts (such as tiers of service) not referred to in the statute.)

The court correctly rejected Cablevision's arguments based on FCC terms appearing in copyright revision bills that preceded the Copyright Act of 1976. *Id.* 28a-29a. The statutory term "basic service of providing secondary transmissions of primary broadcast transmitters" cannot be equated with the FCC terms such as "adequate service" that Cablevision cites. In particular, Cablevision's "concept of basic service is . . . simply unrelated to adequate service," *id.* 29a; Cablevision's view is that "the first tier—basic service in its parlance—may contain anything the cable system chooses," but adequate service "presumably involves a specific content," *id.* Moreover, although the term "adequate service" appeared in a number of early copyright revision bills, that term and its variants were deleted from the legislation that Congress enacted in 1976. In the enacted legislation, Congress discarded the provisions of prior bills creating a narrow compulsory license linked to "adequate service," and transformed the calculation of royalty fees by introducing the DSE values. As the court of appeals concluded, little significance can be attributed to an unenacted bill creating a compulsory license very different from the one Congress ultimately created. *Id.* 28a.

724 F.2d 176 (D.C. Cir. 1983), and statutorily authorized inflation adjustments.[14] Total revenues for the cable industry for 1987 have been estimated at $12 billion. *See New York Times*, April 17, 1988, § 3 at 1. Royalty fees for broadcast programming thus continue to represent less than 1% of revenues.[15] If Cablevision or other cable operators are dissatisfied with the current level of royalty payments, their remedy is in Congress, not in this Court.

Cablevision's reliance (Pet. 17-18 n.12) on *Bethlehem Steel Corp.* v. *EPA*, 723 F.2d 1303 (7th Cir. 1983), where the agency exceeded its statutory authority, *id.* at 1310, is misplaced. It is Cablevision's interpretation—which has been rejected by both par-

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[14] Congress empowered the Copyright Royalty Tribunal to adjust the royalty rates in 1980 and every five years thereafter, so as "to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act." 17 U.S.C. § 801(b)(2)(A). Adjustments were needed and made in 1980 and 1985 to take account of inflation. *See* 50 Fed. Reg. 18,480 (1985); 46 Fed. Reg. 892 (1981), *amended*, 47 Fed. Reg. 52,146 (1982). The fact that the royalty rates had to be adjusted to maintain "the real constant dollar level of the royalty fee per subscriber" is itself proof that copyright owners have not received "windfall payments."

[15] Cablevision's reference to copyright owners' request for interest on past underpayments, Pet. 28, is puzzling. Congress clearly contemplated that copyright owners would receive interest on royalty fees paid to the Copyright Office: §111(d)(2) expressly provides that royalty fees deposited with the Copyright Office "shall be invested in interest-bearing United States securities for later distribution with interest." The request that the Office require payment of interest by cable operators that have made underpayments merely seeks to effectuate Congress's intent.

ties to the 1976 compromise, MPAA and NCTA; by the Copyright Office; and by two courts—that would alter the industry compromise by allowing a cable operator to exclude from "gross receipts" all subscriber revenues from broadcast retransmissions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 4, 1988

Nos. 87-1642 and 87-1814

In the Supreme Court of the United States

OCTOBER TERM, 1987

CABLEVISION COMPANY, PETITIONER

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC., PETITIONER

v.

COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 111 of the Copyright Act of 1976, 17 U.S.C. (& Supp. IV) 111, establishes a compulsory license under which cable television operators may retransmit local and distant broadcast television signals if they pay a royalty fee. The fee is "computed on the basis of specified percentages of the gross receipts from subscribers * * * for the basic service of providing secondary transmissions of primary broadcast transmitters * * *." 17 U.S.C. (Supp. IV) 111(d)(1)(B). The question presented is whether a regulation issued by the Copyright Office, under which "gross receipts" includes the full amount of the subscription fees paid for any package (or "tier") of services offered at a single price that includes at least one broadcast signal, even if that tier also includes original nonbroadcast signals, is contrary to the Act.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a)[1] is reported at 836 F.2d 599. The opinion of the district court (Pet. App. 36a-58a) is reported at 641 F. Supp. 1154.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1988. Petitioner Cablevision Company filed its petition for a writ of certiorari on April 4, 1988. On March 22, 1988, the Chief Justice extended petitioner National Cable Television Association's time for filing a petition for

[1] The opinions of the court of appeals and the district court appear at the same pages in the appendices of both petitions.

a writ of certiorari to May 4, 1988, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1968, this Court held that a cable television operator does not infringe the copyrights on television programs when it intercepts and retransmits to its subscribers the signal broadcast by a television station. *Fortnightly Corp.* v. *United Artists Television,* 392 U.S. 390. In 1974, the Court held that the same rule applies even when the cable system imports a distant station that could not be received by its subscribers using ordinary antennas. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.,* 415 U.S. 394. In so ruling, the Court noted that the retransmission by a cable system of distant broadcast signals might harm the economic interests of the copyright holders; however, the remedy for any such problem, the Court suggested, lay with the legislature (*id.* at 413-414 n.15).[2]

Congress fashioned a remedy as part of the comprehensive revision of the copyright laws in 1976. Copyright Act of 1976, 17 U.S.C. (& Supp. IV) 101 *et seq.* Recognizing "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable

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[2] The problem for copyright owners, it was suggested, was that, because the programs would be broadcast in the distant market via cable, the owners might find it harder to sell their programs there directly. At the same time, they might not receive higher fees from the broadcast station, because that station might not be able to recoup such fees from its local advertisers, who might have no economic interest in paying for additional viewers who are too distant to be likely customers. 415 U.S. at 413-414 n.15; see Pet. App. 7a.

system" (H.R. Rep. 94-1476, 94th Cong., 2d Sess. 89 (1976)), Congress adopted a simplified compulsory license scheme that permits a cable system to retransmit television broadcast signals but requires, in return, the payment of a royalty fee, which is eventually distributed to the copyright owners. Section 111, 17 U.S.C. 111.[3] The statutory formula for computing the royalty fee (Section 111(d)(1)(B)-(D)) reflects Congress's judgment that copyright owners require compensation primarily for the retransmission of distant rather than local stations, because local stations already intend to make their signals available to local viewers. It also reflects the judgment that importing a distant station causes considerably less harm if that station is a network affiliate rather than an independent station, because the copyright owner already intends to have network programs reach a nationwide audience. See H.R. Rep. 94-1476, *supra,* at 90. By contrast, a cable system's retransmission of non-network programming from distant stations, Congress concluded, "adversely affects the ability of the copyright owner to exploit the work in the distant market" (*ibid.*).

The royalty fee is a percentage of a cable system's "gross receipts from subscribers to the cable service * * * for the basic service of providing secondary transmissions of primary broadcast transmitters" (Section 111(d)(1)(B)). Except for small operators (Section 111(d)(1)(C) and (D)), the percentage is based on the number of distant signals carried by the particular operator, calculated according to a system of "distant signal equivalents" (DSEs) that assigns different values to different types of distant signals—commercial independent stations, 1.0; network

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[3] "Section ____" hereafter refers to a section of the Copyright Act and, hence, of Title 17 of the United States Code, as amended.

or non-commercial stations, 0.25 (Section 111(f)).[4] Small cable systems—those with gross receipts less than certain figures—pay fixed percentages of their gross receipts in lieu of calculating their DSEs (Section 111(d)(1)(C) and (D)).

Every six months, each cable system must deposit with the Register of Copyrights, "in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal, * * * prescribe by regulation * * *," both "a statement of account," which reports gross receipts among other items, and the amount of the royalty fee that is due (Section 111(d)(1)). The Copyright Office deposits the money in the Treasury (Section 111(d)(2)). The Copyright Royalty Tribunal then distributes the money to copyright owners whose works were retransmitted beyond their local broadcast areas (Section 111(d)(3) and (4)).

b. This case concerns the meaning of the term "gross receipts * * * for the basic service of providing secondary transmissions" (Section 111(d)(1)(B)). In 1976, Congress described a "typical system" as "a central antenna which receives and amplifies [broadcast] television signals" and transmits them to subcribers through cables (H.R. Rep. 94-1476, *supra,* at 88).

> In addition to an installation charge, the subscribers pay a monthly charge for the basic service averaging

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[4] The Act set the initial rates at 0.675% of gross receipts for the first DSE, 0.425% for each of the next three DSEs, and 0.2% for each additional DSE. A fraction of a DSE is computed at its fractional value. Each cable system must pay a minimum of 0.675% for the right to carry any distant signal, even if its total DSEs are less than 1.0. Section 111(d)(1)(B).

The Copyright Royalty Tribunal (CRT) was empowered to adjust the rates to account for inflation or deflation, certain changes in the average rates paid by subscribers for cable service, and certain changes in Federal Communications Commission rules. Section 801(b)(2)(A)-(C). Currently, the basic rates are 0.893% for the first DSE, 0.563% for each of the next three, and 0.265% for each additional DSE, with a 0.893% minimum. 37 C.F.R. 308.2(a). There are exceptions. See, *e.g.*, 37 C.F.R. 308.2(c) and (d).

> about six dollars. A large number of these systems provide automated programming. A growing number of CATV systems also originate programs, such as movies and charge additional fees for this service (pay-cable).

Shortly after the Act went into effect, the Copyright Office, in issuing regulations, explained that broadcast and non-broadcast services sold in a single package as part of a "basic service" would not be unbundled for royalty purposes: if a cable system charged a single monthly fee for service "that include[d] retransmission of radio and television signals and local origination (such as time and weather and automated news services)," it could not allocate a portion of the fee to the non-broadcast services, but rather had to include the entire fee in its calculation of "gross receipts." 43 Fed. Reg. 27827, 27828, 27832 (1978).

In the years since the 1976 Act, the cable market changed. Systems have come to rely heavily on a large number of original cable channels, such as ESPN and Cable News Network, that typically are distributed by satellite and carry commercials. In addition, several broadcast stations, such as WTBS from Atlanta and WGN from Chicago, are distributed nationwide by satellite (so-called superstations). Many cable systems offer a single package of stations, including local broadcast stations, distant broadcast stations (including superstations), and original cable stations, all for a single monthly charge. Other cable systems offer subscribers two or more different levels (or "tiers") of services, each tier containing a particular package of stations for a single price. Often, even the highest tier contains at least one broadcast station. On top of these tiers of service, most cable systems also offer channels, such as HBO or Showtime, for which subscribers usually pay a separate fee. See Pet. App. 11a-12a.

In 1981, in light of these developments, the Copyright Office "undertook an exhaustive reevaluation of its regulations" (Pet. App. 13a) to determine how to apply the term "gross receipts" when a cable system charges a single price for a package of stations that includes local and distant broadcast stations (including superstations) as well as original cable stations. See 46 Fed. Reg. 30649-30650 (1981). At public hearings, petitioner National Cable Television Association (NCTA) opposed prorating single subscriber fees for single tiers according to the portions of broadcast and non-broadcast channels, arguing that such a step would "add an undue complication," might lead to "substantial litigation and dispute" and "could create a regulatory monster" (C.A. App. 325-327; see Pet. App. 13a-14a). The Copyright Office subsequently adopted a regulation that provides that "[g]ross receipts for the 'basic service of providing secondary transmissions of primary broadcast transmitters' include the full amount of monthy (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals." 37 C.F.R. 201.17(b)(1); 49 Fed. Reg. 13029 (1984). Gross receipts, under the regulation, do not include "charges for pay cable or other program origination services: *Provided* That, the origination services are not offered in combination with secondary transmission service for a single fee" (*ibid.*).

2. While the Copyright Office's rulemaking proceedings were pending, petitioners filed separate suits in the United States District Court for the District of Columbia against groups of copyright owners, seeking declaratory judgments establishing that their own definitions of "gross receipts" should apply (Pet. App. 14a-15a). Petitioner Cablevision argued that the term includes only the amount that a cable system charges for its lowest

available tier of service, even if the higher tiers include additional broadcast stations (*id.* at 14a). Petitioner NCTA, in contrast, abandoned the position that it had taken at the Copyright Office hearings and argued that the single charge for a mixed tier of broadcast and non-broadcast channels should be allocated between those channels, and only the portion for the broadcast channels should be included in gross receipts (*id.* at 15a). The district court rejected Cablevision's approach as inconsistent with Congress's intent, but it accepted NCTA's approach, and ordered the Copyright Office to devise a method of unbundling the broadcast revenues from mixed-tier, single-fee revenues (*id.* at 36a-56a).

3. The court of appeals rejected both petitioners' approaches and upheld the view adopted by the Copyright Office (Pet. App. 1a-35a). The court first noted (*id.* at 17a) that the Copyright Act contains both a general authorization for the Register of Copyrights (head of the Copyright Office) to issue regulations and a specific authorization for him to establish "requirements" by regulation for the deposit of cable royalty fees (Sections 702, 111(d)(1)). Congress intended that the courts defer to the Register's "reasonable interpretations" of Section 111, the court reasoned, because "a holding that forced resolution of every dispute in an infringement or declaratory judgment action would be unfaithful to" Congress's choice to reject as "unworkable" a "traditional, contract-based" scheme in favor of "a low cost" scheme (Pet. App. 18a-19a). Moreover, the court concluded, both the Copyright Office's expertise in the area (compared with that of courts), and the principle recognized in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984), that it is appropriate for an agency to make policy choices to resolve statutory ambiguities, entitle the Copyright Office to deference in applying Section 111. Pet. App. 19a.

In any event, the court of appeals held that the Register's regulation implementing the key phrase in the statute, "gross receipts * * * for the basic service of providing secondary transmissions," was valid. That interpretation, the court found, was the one "that best accounts for the statutory language"; the petitioners' interpretations, in contrast, would not give effect to every word of the statute (Pet. App. 22a).[5] Further, the court explained, "Congress picked a *convenient* revenue base" for its DSE formula: it deliberately included in that base revenues from retransmissions of *local* broadcasts even though those retransmissions are not reimbursed by the royalty fund, because including such revenues would be "more practical" than attempting to separate them (*id.* at 23a-24a (emphasis in original)). "We find no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions * * *. Congress instead chose an easily calculable revenue base * * *. The Copyright Office has simply continued that practice" (*id.* at 24a). In contrast, under petitioner NCTA's allocation approach, "[m]ethodological wrangles and monitoring expenses far in excess of those required under the Copyright Office's regulation are easily foreseeable and would thwart the congressional goal of minimizing transaction costs" (*id.* at 25a). Petitioner Cablevision's approach, which limits calculations to revenues from the first tier, is not as complex, the court observed, but the court found it "untenable, since it could

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[5] Petitioner NCTA's position, requiring allocation between broadcast and non-broadcast channels, "reads 'basic service' out of the statute," the court concluded, while petitioner Cablevision's view that only the lowest tier of service is counted, no matter what its content, makes "superfluous" the phrase "of providing secondary transmissions," a term that "would seem to serve the purpose in the statute of explaining 'basic service' " (Pet. App. 22a).

lead to the absurdity of only a minuscule portion of revenues, at the option of a cable company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective" (*id.* at 29a-30a (footnote omitted)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioners challenge (87-1642 Pet. 11-26; 87-1814 Pet. 9-22) the court of appeals' ruling that deference was owed to the views of the Copyright Office about how best to apply the statutory "gross receipts" concept to mixed-tier cable television services. As an initial matter, we think it is clear that the court of appeals' decision would have been the same even if it had given no deference to those views. The court specifically rejected petitioner Cablevision's position as an untenable construction of the statute (Pet. App. 29a), and it reasoned that the Copyright Office's view was in fact a better reading of the statute than either of petitioners' readings (*id.* at 21a-29a). Thus, we doubt that the primary issue urged by petitioners is squarely presented by the decision below. In any event, petitioners' challenge to this aspect of the court of appeals' decision is meritless.

a. The Register of Copyrights has ample authority to issue regulations such as the one at issue in this case. First, the Register has general rulemaking authority for the entire range of his activities (subject to the approval of the Librarian of Congress). Section 702.[6] The Register has for

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[6] Section 702 provides:

> The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this

decades been issuing regulations under that authority, including substantive implementations of the copyright laws. 37 C.F.R. Pts. 201-202. See *Mazer* v. *Stein*, 347 U.S. 201, 211-213 (1954).

Moreover, the Register has specific authority to regulate cable television copyright fees paid under Section 111. Under Section 111(d)(1), a cable system using the compulsory license process must deposit with the Register semiannually its "statement of account" and its royalty fee, "in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal * * *, prescribe by regulation." Nothing in this provision limits the Register's role to mechanical and ministerial tasks, as petitioners insist (87-1642 Pet. 14-16; 87-1814 Pet. 10, 12-14). The power to "prescribe by regulation" the "requirements" for filing a "statement of account," as well as for filing the royalty fee itself, readily includes the authority to establish particular accounting practices, such as what items are to be counted as "gross receipts" and what methods, if any, are acceptable for allocating sums shown on the books of a cable company to the items required to be reported. Indeed, the fact that petitioner Cablevision, a major nationwide cable system operator, offers so different an interpretation of the Act than petitioner NCTA, the industry's leading trade association, itself suggests the chaos that could result if the Register could not go beyond mechanical tasks in establishing "requirements" under Section 111. Congress gave the Copyright Office regulatory power to help make the compulsory license system work.

b. In recognition of the Register's authority to adopt regulations and otherwise to interpret the Copyright Act,

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title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

this Court and many other courts have long accorded deference to the Register's substantive views on copyright questions. In the landmark case concerning whether a work of art that is incorporated into a useful object may be copyrighted, this Court reached its decision only after an extensive discussion of the Copyright Office regulations and practices dating back to 1870; the Court followed the then-current regulation, noting that it was "a contemporaneous and long-continued construction of the statutes by the agency charged to administer them * * *." *Mazer* v. *Stein*, 347 U.S. at 211-213. Similarly, in *Goldstein* v. *California*, 412 U.S. 546 (1973), this Court reached its decision on whether mechanical recordings are subject to copyright "[i]n light of th[e] consistent interpretation by the courts, the agency empowered to administer the copyright statutes [the Copyright Office], and Congress itself" (*id.* at 568-569). The courts of appeals have also deferred to Copyright Office regulations with great frequency.[7]

Unsurprisingly, most of the cited decisions involve questions of what may be copyrighted, but the substantive nature of such questions is wholly inconsistent with Petitioners' attempt to characterize the Copyright Office as performing only ministerial or mechanical tasks. In any event, the decisions according the Office deference are not limited to copyrightability questions.[8] The provisions at issue here simply require the Copyright Office to apply its

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[7] See *Norris Industries* v. *ITT*, 696 F.2d 918, 922 (11th Cir.), cert. denied, 464 U.S. 818 (1983); *Schnapper* v. *Foley*, 667 F.2d 102, 110 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982); *Esquire, Inc.* v. *Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 297-298 (4th Cir. 1978).

[8] See, *e.g.*, *National Conference of Bar Examiners* v. *Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

judgment in a part of the cable television field that, like other areas of copyright, is committed to the Register's superintendence. The court of appeals correctly followed the consistent judicial practice of according the Copyright Office due deference within its areas of responsibility.[9]

De Sylva v. *Ballentine,* 351 U.S. 570, 577-578 (1956), relied on by petitioner Cablevision (87-1642 Pet. 13-14) but not by petitioner NCTA, expressly recognizes that deference should be afforded to interpretations of the Register in appropriate circumstances. There, the Register "frankly admitted" that the Copyright Office practice at issue was "more the result of a decision that there [was] substantial doubt over the question, rather than the result of a confident interpretation of the statute" (351 U.S. at 577). Thus, said the Court, "[a]lthough we would ordinarily give weight to the interpretation of an ambiguous statute by the agency charged with its administration [citing *Mazer*], we think the Copyright Office's explanation of its practice deprives the practice of any force as an interpretation of the statute * * * *in this instance*" (351 U.S. at 577-578 (emphasis added)). Here, in contrast, the Register made the sort of definite interpretation of the statute to which deference is due (Pet. App. 20a-21a).

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[9] Petitioner Cablevision emphasizes that in at least some of the copyrightability cases "the Courts noted both the Copyright Office's decades of experience, and the fact that Congess had approved and ratified the Office's position when it revised the copyright laws in 1976" (87-1642 Pet. 13 n.7). But this is hardly an argument for refusing to afford due deference to the Office's judgments in the cable field: the lesser experience and lack of congressional reliance on the Office in this field is simply attributable to its newness. Of course, the *degree* of deference depends on the circumstances. Here, for example, it was entirely proper for the court of appeals to take account of the recent vintage of the cable TV regulations while noting that "the agency has had time to accumulate experience" since the 1976 revisions (Pet. App. 19a).

Similarly, *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975), on which both petitioners rely (87-1642 Pet. 13-14; 87-1814 Pet. 10-11), does not create a conflict among the circuits. The court there merely refused to give controlling weight to a definition of "posthumous" that appeared on a Copyright Office form, noting that "it is unlikely, when preparing the form, that the Register of Copyrights considered the situation" (523 F.2d at 946-947 & n.10). It also concluded that the definition was inconsistent with legislative intent, rendering the court's brief remarks on deference dicta.[10] Finally, *Bartok* did not involve the Register's powers under Section 111. In circumstances like those here, involving a well-considered decision about how to implement Section 111, there is no reason to think that the Second Circuit would apply any different standard of deference from that applied by the court below.

c. Petitioners' suggestion that the Register is not entitled to deference because "[f]rom its inception, * * * the Copyright Office has had an institutional bias favoring copyright owners" (87-1814 Pet. 14-15) is wholly unfounded. See also 87-1642 Pet. 12. The evidence offered consists almost entirely of a single statement by the former

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[10] The *Bartok* court said that "the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight" (523 F.2d at 946-947 (footnotes omitted)). The court offered wholly inadequate support for this statement. The first point mistakenly relies on an irrelevant regulation, which merely provides that the Copyright Office will not give opinions in specific concrete cases. See 37 C.F.R. 201.2(a)(1). Petitioner NCTA's reliance on the same regulation (87-1814 Pet. 11) is similarly misplaced (see also 87-1642 Pet. 8). The *Bartok* court likewise offered no authority for the proposition that the Register may not "define legal terms." For the third proposition, regarding an issue of first impression, the court simply cited *De Sylva,* which, as we have shown, does not support so broad and sweeping a notion.

Register, Barbara Ringer, that "my responsibility is to one group and one group only, and that is * * * the authors of the so-called writings."[11] That statement, however, was not made in discussing the cable television issue or indeed in any rulemaking proceeding; it was made at a congressional hearing as part of the agency head's urging that Congress keep in mind whom it was trying to protect in drafting the 1976 revisions. Petitioners cite no evidence whatever that any alleged bias affected the way Ms. Ringer or her successors handled the issues presented here or any other issue.[12]

d. Petitioner NCTA argues (87-1814 Pet. 19-22) that deference cannot be given to the Copyright Office because that office is part of the Library of Congress, which in turn is part of the Legislative Branch, whereas only an Executive Branch agency may interpret statutes. This argument may not be raised in this Court, because it was not raised below. See *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no occasion for making an exception in these cases: petitioner NCTA was on notice of the issue, as a case extensively discussing it was cited in the briefs below. See *Eltra Corp.* v. *Ringer*, 579 F.2d 294 (4th Cir. 1978).

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[11] *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 106 (1975). Petitioner NCTA also cites a statement by former Register Kaminstein that "I make no bones about favoring authors, composers, and artists" (*id.* at 94.)

[12] Petitioner NCTA relies (87-1814 Pet. 17) on a statement, in the preamble to certain interim regulations, that the Copyright Office "construe[s] the compulsory license strictly," 49 Fed. Reg. 14950 (1984). That statement, though, is a legitimate interpretation of the statute and not an indication of bias. If an agency, with its expertise and experience, concludes that its statute needs to be construed strictly, that conclusion is indistinguishable from any other conclusion about the meaning of a statute. If reasonable, it is entitled to deference.

In any event, the argument depends on the status of the Librarian of Congress, but petitioner NCTA fails to show why the Librarian should be equated, in terms of subservience to Congress, with the Comptroller General. See *Bowsher* v. *Synar*, 478 U.S. 714 (1986). The critical difference is that no statute gives Congress any role in the Librarian's removal from or appointment to office. The Librarian is appointed by the President, with the advice and consent of the Senate, and the statute is silent on removal. 2 U.S.C. 136. He is therefore removable solely by the President, since "[t]he general and long-standing rule is that, in the face of statutory silence, the power of removal presumptively is incident to the power of appointment." *Kalaris* v. *Donovan*, 697 F.2d 376, 389 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983); see *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896-897 (1961); *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839). Moreover, the legislative history of the appointment provision (Act of Feb. 19, 1897, ch. 265, § 1, 29 Stat. 544) undercuts any suggestion that the Librarian is subservient to Congress. In the House debate over the provision, a member of the Joint Library Committee argued that the Library is a legislative agency and proposed an amendment that would place it squarely under the control of Congress. 29 Cong. Rec. 313-318 (1896) (remarks of Rep. Quigg). The floor manager on behalf of the Appropriations Committee replied (to "loud applause") that the Library "is an executive bureau, and as such should be presided over by some executive officer" (*id.* at 318-319 (remarks of Rep. Dockery)). The latter view prevailed in the House (*id.* at 319) and in conference (*id.* at 1947). In the end, all petitioner NCTA can point to is the mere label of the office.

2. Petitioners also challenge (87-1642 Pet. 27-29; 87-1814 Pet. 22-26) the Register's position, and the court of appeals' approval of it, on the merits. But, as the court of appeals correctly concluded, the Register's interpretation is, at a minimum, "based on a permissible construction of the statute" (*Chevron*, 467 U.S. at 843 (footnote omitted)). The statutory term, "the basic service of providing secondary transmissions of primary broadcast transmitters" (Section 111(d)(1)(A)), plainly does not determine unambiguously that mixed-tier services that include broadcast channels must be unbundled. Indeed, it tends to suggest, by its reference to the entire "basic service" of providing the specified transmissions, that such unbundling would be inappropriate. Moreover, what evidence there is shows that Congress did not specifically contemplate the question of royalty payments for cable systems' offering multiple, mixed tiers—a practice not prevalent in 1976. See, *e.g.*, Pet. App. 10a-11a, 27a. The Register's decision to require full inclusion of any tier that includes broadcast signals not only is well within the statutory language but, in stark contrast to petitioner NCTA's proposal, promotes the goal of administrative simplicity that lay behind Congress's establishment of the compulsory license system in the first place (H.R. Rep. 94-1476, *supra*, at 89). It also avoids the absurd position, which would be permitted by petitioner Cablevision's proposal, that cable operators could arrange their pricing to include only a minuscule portion of revenues in the lowest tier of service.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60497